PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-382 SEP 20 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
BRIAN C. TOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HILARY C. TOMPKINS
Solicitor
Department of the Interior
Washington, D.C. 20460

QUESTION PRESENTED

Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Reasons for granting the petition 7
A. The Federal Circuit's abrogation of the government's attorney-client privilege in matters concerning Indian property cannot be squared with this Court's precedents or with the Executive Branch's established understanding of the role of its attorneys 10
1. The government, not the Tribe, is the "real client" of government attorneys 12
2. The government does not have a common-law duty to disclose attorney-client privileged communications to Indian tribes 21
B. The Federal Circuit's decision threatens significant adverse consequences 30
1. The Federal Circuit's rule affects more than 90 pending cases seeking billions of dollars from the government 30
2. The Federal Circuit's decision will chill consultation on tribal trust issues 30
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Coastal States Gas Corp. v. *Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980) 11

Cases—Continued: Page

Cobell v. *Norton*:
240 F.3d 1081 (D.C. Cir. 2001) 7
428 F.3d 1070 (D.C. Cir. 2005), cert. dismissed, 130 S. Ct. 3497 (2010) 20, 23
Cobell v. *Salazar*, 573 F.3d 808 (D.C. Cir. 2009), cert. dismissed, 130 S. Ct. 3497 (2010) 20, 23
Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009) 15
Department of the Interior v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) 13
Gros Ventre Tribe v. *United States*, 469 F.3d 801 (9th Cir. 2006), cert. denied, 552 U.S. 824 (2007) 23
Heckman v. *United States*, 224 U.S. 413 (1912) 12, 13
Jaffee v. *Redmond*, 518 U.S. 1 (1996) 29
Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 25
Lindsey, In re, 158 F.3d 1263 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998) 10
Lyng v. *Payne*, 476 U.S. 926 (1986) 25
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 2
Mohawk Indus., Inc. v. *Carpenter*, 130 S. Ct. 599 (2009) 7
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) 10
Nevada v. *United States*, 463 U.S. 110 (1983) 6, 8, 16, 27, 28
Oneida County v. *Oneida Indian Nation*, 470 U.S. 226 (1985) 26
Osage Nation and/or Tribe of Indians v. *United States*, 66 Fed. Cl. 244 (2005) 4

Cases—Continued: Page

Pyramid Lake Paiute Tribe of Indians v. *Morton*, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975) 18

Riggs Nat'l Bank v. *Zimmer*, 355 A.2d 709 (Del. Ch. 1976) 19

Rincon Band of Mission Indians v. *Escondido Mut. Water Co.*, 459 F.2d 1082 (9th Cir. 1972) 18

Shinnecock Indian Nation v. *Kempthorne*, 652 F. Supp. 2d 345 (E.D.N.Y. 2009) 11

Skull Valley Band of Goshute Indians v. *Kempthorne*, No. 04-cv-00339, 2007 WL 915211 (D.D.C. 2007) 11

Swidler & Berlin v. *United States*, 524 U.S. 399 (1998) 32

Tax Analysts v. *IRS*, 117 F.3d 607 (D.C. Cir. 1997) 11

United States v. *Candelaria*, 271 U.S. 432 (1926) 8, 12, 13

United States v. *Mett*, 178 F.3d 1058 (9th Cir. 1999) 31

United States v. *Minnesota*, 270 U.S. 181 (1926) 8, 12, 13

United States v. *Mitchell*:

445 U.S. 535 (1980) 24

463 U.S. 206 (1983) 22, 24, 30

United States v. *Navajo Nation*:

537 U.S. 488 (2003) 9, 22, 25

129 S. Ct. 1547 (2009) 9, 22, 23

United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 24

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 29, 32

Case—Continued: Page

Wachtel v. *Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) 19

Constitution, statutes and regulations:

U.S. Const. Art. IV § 3, Cl. 2 (Property Clause) 25

American Indian Trust Fund Management Reform Act of 1994:

25 U.S.C. 162a(d) 25, 26

25 U.S.C. 4011 25

25 U.S.C. 4011(a) 23

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, Div. E, Tit. I, 123 Stat. 718 19

Freedom of Information Act, 5 U.S.C. 552(b)(5) 11, 27

Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.*:

30 U.S.C. 1715(a) 25

30 U.S.C. 1732(b)(2) 25

Federal Records Act of 1950, 44 U.S.C. 2901(1) 20

Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. I, §§ 2-6, 96 Stat. 1976 (25 U.S.C. 2415 note) 26

§§ 3-6, 96 Stat. 1977 26

§ 5(b), 96 Stat. 1978 ..... 9, 26

Indian General Allotment Act, 25 U.S.C. 348 (1976) 24

Indian Mining Leasing Act of 1938, 25 U.S.C. 396a *et seq.* 2

Indian Tucker Act, 28 U.S.C. 1505 22

5 U.S.C. 3106 33

Statutes and regulations—Continued: Page

10 U.S.C. 827 17
18 U.S.C. 3006A(g)(2)(A) 17
25 U.S.C. 161a(a) 3, 23
25 U.S.C. 162a(a) 2, 23
25 U.S.C. 175 18
28 U.S.C. 516 14
43 U.S.C. 1455 ..... 3, 17
43 U.S.C. 1457 27
43 U.S.C. 1460 25
44 U.S.C. 3301 20
25 C.F.R.:
Section 115.801 27
Section 115.802 27
Section 115.803 27
Section 115.1000(a) 27
Section 115.1000(a)(2) 20
Section 1200.40(a) 18
28 C.F.R. 50.15(a) 18

Miscellaneous:

Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47 (1982) 17, 33
George Gleason Bogert & George Taylor Bogert, *Law of Trusts and Trustees* (2d ed. 1980) 28
Confidentiality of the Att'y General's Commc'ns in Counseling the President, 6 Op. Off. Legal Counsel 481 (1982) 11

Miscellaneous—Continued: Page

Letter from Lois J. Schiffer, Acting Asst. Att'y Gen., U.S. Dep't of Justice, to Geoffrey C. Hazard, Jr., Professor, Yale Law School & Charles W. Wolfram, Professor, Cornell Law School (1994) 16

Model Rules of Prof'l Conduct (2007):

Rule 1.2 32

Rule 1.7 33

Relationship Between Dep't of Justice Att'ys & Person on Whose Behalf the United States Brings Suits under the Fair Hous. Act, 19 Op. Off. Legal Counsel 1 (1995) 16, 18, 28, 33

Restatement (First) of Judgments (1942) 13

1 Restatement (Second) of Judgments (1982) 14

1 Restatement (Second) of Trusts (1959) 19, 21, 28

1 Restatement (Third) of Law Governing Lawyers (2000) 10, 11

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 11

2A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* (4th ed. 1987) 28

James Simon, Deputy Asst. Att'y Gen., Env't & Natural Res. Div., Ethics: Conflicts of Interest and the Role of the Trustee, Remarks at Fed. Bar Ass'n 21st Annual Indian Law Conference (1996) 16

U.S. Dep't of Justice, *United States Attorney's Manual*, http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html 15

U.S. Dep't of the Interior, *About the Department of the Interior: DOI Quick Facts* (Feb. 6, 2009), www.doi.gov/facts.html 31

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 590 F.3d 1305. The opinion of the Court of Federal Claims (App. 24a-90a) is reported at 88 Fed. Cl. 1.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2009. A petition for rehearing was denied on April 22, 2010 (App. 91a-92a). On July 7, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August

20, 2010. On August 10, 2010, the Chief Justice further extended the time to and including September 19, 2010 (Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this petition. App. 139a-141a.

STATEMENT

1. In 2002, the Jicarilla Apache Nation (Tribe), a federally-recognized Indian tribe, sued the United States in the Court of Federal Claims (CFC) for an alleged breach of fiduciary duties. App. 98a-120a. According to the Tribe's complaint, the United States holds about 900,000 acres of reservation land in trust for the Tribe. The land contains timber, gravel, and oil and gas resources, development of which is governed by statutes administered by the Department of the Interior (Interior). App. 102a-103a; see *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982) (citing Indian Mining Leasing Act of 1938, 25 U.S.C. 396a *et seq.*). Funds derived from those natural resources—*e.g.*, mineral leasing royalties and timber sale proceeds—are held in trust for the Tribe. App. 104a-105a. The Tribe alleges that Interior has failed to render an accurate accounting of the trust funds and other assets and has mismanaged those assets.[1] The Tribe seeks, *inter alia*, a complete

---

[1] The Secretary of the Interior (Secretary) is statutorily authorized to invest funds held in trust for Indian tribes. See 25 U.S.C. 162a(a). To a lesser extent, the Tribe's allegations also implicate the Secretary

accounting of all assets held in trust for the Tribe since 1946 and $300 million in damages. App. 115a-119a.

The current phase of the litigation covers the Tribe's claims relating to the government's actions with respect to certain trust-fund accounts from 1972 to 1992.[2] App. 26a. Over the course of more than five years, the United States produced to the Tribe many thousands of documents but identified (through multiple privilege logs) 155 potentially relevant documents that had been withheld on the basis of the attorney-client privilege and attorney work-product protection. App. 25a-26a. The documents withheld include memoranda concerning tribal trust administration exchanged between attorneys in Interior's Office of the Solicitor and various agency personnel from Interior, including the Bureau of Indian Affairs, and from the Department of the Treasury. App. 50a-52a, 71a-84a.[3]

2. The Tribe moved to compel production of the documents that had been withheld as privileged, arguing that they fell within a "fiduciary exception" to the attorney-client privilege that has been recognized by some courts in the context of private, common-law trusts. The CFC granted, in relevant part, the Tribe's motion to compel. App. 24a-90a.

The CFC explained that the "fiduciary exception" to the attorney-client privilege, as applied in other contexts, precludes a trustee from withholding from the

---

of the Treasury, who invests such funds at Interior's direction. See 25 U.S.C. 161a(a).

[2] The Tribe's claims relating to the management of non-monetary assets held in trust for the Tribe are to be evaluated in future phases of the case.

[3] Pursuant to 43 U.S.C. 1455, the Solicitor supervises and directs the legal work of the Department of the Interior.

beneficiary communications between the trustee and attorneys retained by the trustee that relate to trust management. App. 41a-44a. Relying on several CFC and district court opinions, the CFC concluded that there is nothing about the government's sovereign status or its trust relationship with Indian tribes that makes the fiduciary exception inapplicable. App. 44a-46a. It stated that "basic trust principles are readily transferrable to the Indian trust context" (App. 45a), notwithstanding that statutes establish the government's duties (App. 31a) and that the government uses its own funds (not tribal trust funds) to pay for its legal advice (App. 46a).

Applying the fiduciary exception it recognized to the documents at issue, the CFC ordered the government to produce to the Tribe approximately 75 documents that the CFC had found were otherwise covered by the attorney-client privilege. App. 50a-63a, 69a, 71a-84a.[4]

3. The United States petitioned the Federal Circuit for a writ of mandamus directing the CFC to vacate its

---

[4] The CFC, in agreement with most courts, held in this case that no corollary "fiduciary exception" applies to the attorney work-product doctrine. It reasoned that the mutuality of interest between the fiduciary and the beneficiary no longer exists once there is sufficient anticipation of litigation to trigger work-product protection. App. 47a-48a. Accordingly, the CFC did not compel the government to produce documents that constituted attorney work product or did not relate to trust management and thus fell outside the fiduciary exception the court recognized. App. 54a-63a, 69a.

An earlier CFC decision, however, reached the contrary conclusion, holding that the fiduciary exception does apply to the attorney work-product doctrine. See *Osage Nation and/or Tribe of Indians* v. *United States*, 66 Fed. Cl. 244, 252 (2005). The Federal Circuit did not address the applicability of the fiduciary exception to work-product claims, and that issue therefore remains unresolved at the appellate level.

production order. The Federal Circuit granted a temporary stay but then denied the mandamus petition in a published opinion. App. 1a-23a.

The Federal Circuit held that the government cannot deny a tribe's discovery request for attorney-client communications "when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." App. 1a-2a. The court relied on two rationales articulated by the CFC: (a) The trustee is not the attorney's exclusive client because the trustee acts as proxy for the beneficiary; under that justification, the court explained, the fiduciary exception is just a logical extension of the client's control of the attorney-client privilege; and (b) the trustee has a duty to disclose to the beneficiary all information concerning trust management; under that justification, the court explained, the attorney-client privilege gives way to the trustee's competing duty to disclose. App. 13a-14a, 41a-42a.

a. As to the first rationale, the Federal Circuit concluded that Interior "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes." App. 15a. The court stated that the Tribe's "status as the 'real client' stems from its trust relationship with the United States." *Ibid.* The court noted that, in light of what it termed the "general trust relationship" between the United States and Indian tribes, "common law trust principles should generally apply to the United States when it acts as trustee over tribal assets," and that application of a fiduciary exception in this case was thus "straightforward." App. 16a-17a.

The court rejected three counter-arguments advanced by the United States. First, the court deemed "not relevant" this Court's instruction in *Nevada* v. *United States*, 463 U.S. 110 (1983), that "[t]he government cannot follow the fastidious standards of a private fiduciary," on the ground that the government had not articulated a "specific competing interest" (such as a conflicting statutory duty) that was considered when the communications were made. App. 17a-19a (quoting *Nevada*, 463 U.S. at 128). Second, the court, while acknowledging that the source of payment for the legal advice has been regarded by common-law courts as an important factor in determining whether a fiduciary exception applies, dismissed as unhelpful the fact that the government pays for its own legal advice, on the ground that—unlike a private trustee—the government has imposed the trust on the tribal beneficiary. App. 19a-20a. Third, the court found "not relevant" the government's concern that application of the fiduciary exception would impair Interior's ability to seek confidential legal advice, on the ground that the concern could be raised by any trustee and that no assets other than funds were at issue. App. 20a.

b. As to the second rationale, the Federal Circuit concluded that as a "general trustee," the United States has a "common law duty" to disclose information related to trust management to an Indian tribe, "including legal advice on how to manage trust funds." App. 21a-22a. The court rejected the government's argument that Congress's omission of attorney-client communications from the type of information Congress has required Interior to provide to tribes negates any general common-law obligation to disclose such communications. It stated that "the government has other trust responsibilities not

enumerated" by statute, including, the court held, a common-law duty to disclose to the beneficiary all trust-related information. *Ibid.* (quoting *Cobell* v. *Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001)).

4. After the Federal Circuit denied the mandamus petition and lifted its stay of the CFC's order, the CFC set a new production deadline. The CFC denied the government's motion for a stay pending a decision to seek further review. 91 Fed. Cl. 489. The government thereafter complied, producing the documents under a protective order that prevents disclosure to third parties until a petition for a writ of certiorari is either denied or, if granted, until the case is resolved by this Court. App. 93a-97a.[5]

REASONS FOR GRANTING THE PETITION

For the first time in more than a century of litigation between Indians and the United States, a court of appeals has held that the United States must disclose to an Indian tribe confidential communications between the government and its attorneys concerning the performance of governmental functions with respect to tribal property. That holding, which abrogates the government's attorney-client privilege based on rules governing private trustees at common law, cannot be reconciled with this Court's longstanding precedents distinguishing the United States, as a sovereign, from a common-law trustee or with the established understanding of the role

---

[5] The government's compliance with the production order, especially in light of the protective order, does not affect this Court's review. The Court may still provide effective relief by ordering the documents to be returned and excluded from evidence. Cf. *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 606-607 (2009).

of government lawyers representing the United States in Indian affairs.

The Federal Circuit's extension of a "fiduciary exception" to the attorney-client privilege to the United States is based on two fundamentally flawed premises. First, the Federal Circuit erred in treating the Tribe as the "real client" of the government attorneys. Unlike a common-law trustee, the government's obligations to tribes and individual Indians are not derivative of the beneficiary's property interest. Rather, the government's administration of laws concerning tribal trust property is a distinctly sovereign function. That is a bedrock principle of this Court's Indian law jurisprudence. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 128 (1983); *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926). Government attorneys represent only the government, whose sovereign interests include (but are not necessarily limited to) carrying out any responsibilities that are imposed by statute or regulation with respect to property held for Indians. The notion that a tribe is the "real client" of government attorneys when those attorneys give legal advice also conflicts with the Executive Branch's longstanding understanding, as reflected in the Attorney General's 1979 guidance, that "the Attorney General is attorney for the United States in these cases, not a particular tribe." App. 123a. That conclusion also is underscored by the fact that government attorneys are paid from the government's own funds, not from a trust corpus, and that the records and information generated in administering the governing statutes belong outright to the United States, not to the trust corpus or to the tribe.

Second, the Federal Circuit erred in relying on what it identified as a broad common-law duty of a trustee to disclose information, including confidential attorney-client communications, to the beneficiary. To reach that result, the Federal Circuit invoked a "general trust relationship" between the United States and Indian tribes that it believed was "sufficiently similar to a private trust" to impose such a duty. App. 14a, 16a. But the Court's recent decisions in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) *(Navajo Nation I)*, and *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009) *(Navajo Nation II)*—which the Federal Circuit did not even mention—reject reliance on a "general trust relationship" between the United States and tribes to impose common-law trust duties on the government. The *Navajo Nation* decisions instead establish that the government's legal obligations to tribes must be based on statutes and regulations, and no statute or regulation requires the government to disclose attorney-client communications to a tribe whenever they implicate the government's duties with respect to property held in trust for Indians. To the contrary, the Indian Claims Limitation Act of 1982 expressly limited the government's disclosure obligation to Indians to non-privileged information. § 5(b), 96 Stat. 1978.

The Federal Circuit's decision substantially departs from settled principles and, if allowed to stand, would have significant and damaging consequences for the government. There are over 90 pending trust cases brought by Indian tribes in which the question presented could arise. App. 126a-138a. More than half of those cases are pending in the CFC, where the Federal Circuit's decision is controlling and where the government's potential monetary liability is greatest. In this case alone, the

Tribe seeks $300 million (App. 119a), and, collectively, the tribal trust cases expose the government to billions of dollars in liability. The pendency of these cases, and the prospect of future cases by tribes and individual Indians, strongly counsel in favor of this Court's immediate review.

More broadly, the Federal Circuit's decision upends settled expectations regarding the professional responsibilities of government attorneys in providing legal advice on a wide range of matters implicating day-to-day administration of statutes pertaining to Indian property. Indeed, abrogation of the attorney-client privilege would seriously undermine the ability of government decision-makers, including the Secretary, to solicit such advice—to the detriment of the government, the tribes, and individual Indians concerned.

A. The Federal Circuit's Abrogation Of The Government's Attorney-Client Privilege In Matters Concerning Indian Property Cannot Be Squared With This Court's Precedents Or With The Executive Branch's Established Understanding Of The Role Of Its Attorneys

It is well recognized that the United States, like other litigants, may invoke the attorney-client privilege in civil litigation to protect confidential communications between government officials and government attorneys. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154-155 (1975) (noting applicability of attorney work-product protection to government attorneys); *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam) ("Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts."), cert. denied, 525 U.S. 996 (1998); 1 Restatement (Third) of Law Governing Lawyers § 74,

at 573 (2000) (Restatement) ("[T]he attorney-client privilege extends to a communication of a governmental organization."); *Confidentiality of the Att'y General's Commc'ns in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982) ("[T]he privilege also functions to protect communications between government attorneys and client agencies or departments.").[6] That is because "[t]he objectives of the attorney-client privilege * * * apply in general to governmental clients. The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture." Restatement § 74 cmt. b at 573-574; see *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) ("[T]he government is dealing with its attorneys as would any private party

---

[6] Case law in the Freedom of Information Act (FOIA) context demonstrates the availability of the attorney-client privilege to the government in civil proceedings. Under Exemption 5 of FOIA, "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from mandatory disclosure. 5 U.S.C. 552(b)(5). Courts have long recognized that "Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege." *Coastal States Gas Corp.*, 617 F.2d at 862; see, *e.g.*, *Tax Analysts* v. *IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) ("In the government context, the 'client' may be the agency and the attorney may be an agency lawyer."); see also S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) (including within Exemption 5 "documents which would come within the attorney-client privilege if applied to private parties"). Notably, lower courts have applied Exemption 5 to FOIA requests from Indian tribes based on the government's assertion of the attorney-client privilege and attorney work-product protection. See, *e.g.*, *Skull Valley Band of Goshute Indians* v. *Kempthorne*, No. 04-cv-00339, 2007 WL 915211, at *14 n.8 (D.D.C. 2007) (attorney-client privilege); *Shinnecock Indian Nation* v. *Kempthorne*, 652 F. Supp. 2d 345, 362-363 (E.D.N.Y. 2009) (attorney work-product protection).

seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors.").

The Federal Circuit nonetheless advanced two rationales to deny availability of the attorney-client privilege in this case: (1) the Tribe is the government attorneys' "real client" (App. 15a-20a); and (2) the United States is like a private trustee operating under a general "common law duty to disclose" information, including information protected by the attorney-client privilege, to Indian beneficiaries (App. 21a-22a). Both rationales are inconsistent with the government's unique status as a sovereign, as distinguished from a private common-law trustee—a status recognized in both this Court's precedents and the Executive Branch's considered guidance.

1. The government, not the Tribe, is the "real client" of government attorneys

The Federal Circuit's conclusion that Interior "was not the government attorneys' exclusive client, but rather acted as a proxy for the beneficiary Indian tribes" (App. 15a), is incorrect and departs from several of this Court's decisions and the settled Executive Branch position on the issue.

a. This Court has long recognized that the United States has distinctly sovereign interests in administration of property held in trust for tribes, and its interests are not derivative of those of a beneficiary as at common law. See, *e.g.*, *Candelaria*, 271 U.S. at 443-444; *Minnesota*, 270 U.S. at 194; *Heckman* v. *United States*, 224 U.S. 413, 437 (1912). Consistent with that basic premise, the Court has deemed the United States the real party in interest when it acts to protect tribal interests. See

ibid.; see also *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 6 n.1 (2001) (the government is "not technically acting as [the Tribe's] attorney") (citation omitted). It follows that the United States is the only "real client" of government attorneys who provide legal advice to those responsible for carrying out the United States' duties with respect to Indians.

In *Minnesota*, the Court, in a suit by the United States seeking relief against a State that had erroneously conveyed lands that ought to have been reserved for Indians, held that the government—not the Indians—was the real party in interest. 270 U.S. at 193-194. In so doing, the Court concluded that the government's interest in its guardianship over the Indians "is one which is vested in it *as a sovereign*." *Id.* at 194 (emphasis added).

Candelaria reinforces the conclusion that government attorneys acting in furtherance of the United States' sovereign responsibilities in Indian affairs represent the United States. In *Candelaria*, the Court held that res judicata did not prohibit the United States from suing to quiet title to lands on behalf of an Indian tribe, even though the tribe had unsuccessfully brought the same suit twice before without the United States' involvement. 271 U.S. at 438, 443. The Court stated that the United States had an independent interest in enforcing a restriction on alienation of the tribe's lands, and that such interest could not be affected by a judgment in suits the United States had not joined. See *id.* at 443-444. If the tribe had been the "real client" of the government attorneys in *Candelaria*, then res judicata would have barred the action. See Restatement (First) of Judgments § 85(2), at 402-403 (1942) ("Where a per-

son is bound by * * * the rules of res judicata because of a judgment for or against him with reference to a particular subject matter, such rules apply in a subsequent action brought or defended by another on his account."); see also 1 Restatement (Second) of Judgments § 41(1)(a) and (d) at 393 (1982).

In neither *Minnesota* nor *Candelaria* did the Court's conclusion depend, as the Federal Circuit suggested here (App. 19a), on whether the United States had considered a "specific competing interest" in carrying out its responsibilities or on the effect of any such competing interest on a duty of loyalty owed a tribe. Regardless whether a competing interest exists in a particular instance, the United States is always acting as a sovereign—and the government's attorneys represent the sovereign—with respect to Indian affairs. The Federal Circuit's conclusion that the Tribe is the "real client" of government attorneys cannot be squared with those decisions.

b. The Federal Circuit's conclusion that Indian tribes are the "real clients" of government attorneys is also at odds with the Executive Branch's established view. That view recognizes that the Attorney General, who is charged with representing the interests of the United States and its agencies (28 U.S.C. 516), is situated differently from a private attorney representing a common-law trustee.

In 1979, in a letter to the Secretary of the Interior, Attorney General Bell set forth the legal principles governing the Justice Department's role in representing the United States in litigation involving Indian trust property. Among other things, the Attorney General emphasized:

> [T]he Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

App. 123a-124a.

That letter, which rejects the contention that the tribe (rather than the United States) is the Attorney General's client, is entitled to significant deference because it reflects the government's prevailing view of the role of its own attorneys. Cf. *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2477 (2009) (according deference to agency decision to follow past practice). Indeed, for over 25 years, the *United States Attorney's Manual* (*USAM*) has referred to that letter as guidance for government attorneys conducting litigation affecting Indians. See *USAM* § 5-14.130, www.justice.gov/usao/eousa/foia_reading_room/usam/title5/14menv.htm#5-14.130 (referencing *id.*, ENRD Resource Manual, No. 59, www.justice.gov/usao/eousa/foia_reading_room/usam/title5/env00059.htm). And officials of the Justice Department's Environment and Natural Resources Division (ENRD) have reiter-

ated the same view. See Letter from Lois J. Schiffer, Acting Asst. Att'y Gen., U.S. Dep't of Justice, to Geoffrey C. Hazard, Jr., Professor, Yale Law School & Charles W. Wolfram, Professor, Cornell Law School 2 (June 16, 1994) ("The Department * * * represents the United States and not particular Indian tribes."); James Simon, Deputy Asst. Att'y Gen., ENRD, U.S. Dep't of Justice, Ethics: Conflicts of Interest and the Role of the Trustee, Remarks at Fed. Bar Ass'n 21st Annual Indian Law Conference 1 (Apr. 12, 1996) ("In brief, there is no conflict of interest when Department of Justice represents the United States in its capacity as a trustee for Indians and tribes.").

The substance of the Attorney General's conclusion is consistent with the understanding of the government's sovereign interests reflected in the Court's Indian law cases that preceded it (see pp. 12-14, *supra*) as well as those that followed it. In particular, in *Nevada*, the Court recognized that the government acts on behalf of tribes in its capacity as a sovereign. The fact that the United States may face competing interests when acting in furtherance of tribal trust responsibilities therefore does not pose a disabling conflict for the government, 463 U.S. at 128, or, *a fortiorari*, for the government attorneys representing the government. The Attorney General's letter is also consistent with legal opinions of the Office of Legal Counsel that the Attorney General's role in analogous contexts is to represent the overall interests of the United States rather than those of a particular private or governmental entity. See *Relationship Between Dep't of Justice Att'ys & Person on Whose Behalf the United States Brings Suits under the Fair Hous. Act*, 19 Op. Off. Legal Counsel 1, 2-4 (1995) (1995 OLC Op.) (Fair Housing Act complainant is not the At-

torney General's client even when the Attorney General brings suit "on behalf of" the complainant); *Attorney General's Role as Chief Litigator for the United States*, 6 Op. Off. Legal Counsel 47, 54 (1982) (1982 OLC Op.) (Attorney General represents interests of the Executive Branch rather than those of a "client" agency when litigating on its behalf).

There is no reason to distinguish, in the context of this case, between the Attorney General (and other attorneys in the Justice Department) and those in Interior's Office of the Solicitor. Both provide legal advice to agency personnel on tribal trust administration. The Solicitor represents Interior's interests (including but not limited to its responsibilities to Indian tribes and individuals), just as the Attorney General represents the interests of the United States. 43 U.SC. 1455; App. 123a-124a.[7]

c. Nor is there any statutory or regulatory basis in this context that could justify a departure from the settled rule that the government is the sole client of government attorneys. In the few situations in which Congress or the Executive has created an attorney-client relationship between government attorneys and a party other than the government, its intent has been manifest. See 10 U.S.C. 827 (judge advocate serving as military defense counsel); 18 U.S.C. 3006A(g)(2)(A) (federal pub-

[7] Two of the documents ordered to be produced in this case were prepared by the Department of Justice: a 1966 letter from the Attorney General to the Secretary of the Treasury about whether certain instruments issued by the Federal National Mortgage Association give rise to a general obligation of the United States backed by its full faith and credit (App. 80a (Doc. No. 217)); and a 1966 memorandum from the Office of Legal Counsel to the Department of the Treasury about whether trust funds may be invested in obligations of federal land banks and the Banks for Cooperatives (App. 75a (Doc. No. 63)).

lic defenders representing criminal defendants); 28 C.F.R. 50.15(a) (Justice Department's formal representation of individual government employees); see also 1995 OLC Op. 3-4. Neither Congress nor the Executive has provided for an attorney-client relationship between government attorneys and an Indian tribe in the tribal trust context, and the Federal Circuit did not point to any statute or regulation suggesting otherwise.[8]

d. Moreover, government attorneys, even when they provide advice concerning the performance of statutory functions with respect to the property of a particular tribe, are paid from separate government funds rather than tribal trust funds. That established arrangement

[8] Although 25 U.S.C. 175 states that "the United States attorney shall represent [allotted Indians] in all suits at law and in equity"—and although that provision allows select representation of Indians in their personal capacity—it does not affect representation on behalf of the United States in its sovereign trust capacity as discussed in Attorney General Bell's 1979 letter. App. 123a ("[T]he Attorney General is attorney for the United States in [tribal trust] cases, not a particular tribe or individual Indian."). Moreover, the statute does not compel the United States to represent or bring suit on behalf of Indians. See, *e.g.*, *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974) (per curiam) (25 U.S.C. 175 "impose[s] only a discretionary duty of representation"), cert. denied, 420 U.S. 962 (1975); *Rincon Band of Mission Indians* v. *Escondido Mut. Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972) (25 U.S.C. 175 is "not mandatory"). And, on its face, the statute addresses only litigation—not the type of non-litigation, trust-administration advice at issue in this context.

In 25 C.F.R. 1200.40(a), Interior notes that it will make its legal expertise "fully available to advise tribes in developing, implementing, and managing investment plans." In implementing Section 1200.40(a), Interior provides information about applicable law but refers any request for actual legal advice—applying the law to a factual situation—to tribal or individual counsel. That regulation, as interpreted by Interior, thus does not provide the basis for an attorney-client relationship with tribes even when it applies.

reinforces the conclusion that the government, not the tribe, is the client. Courts, including in the "leading American case" (App. 11a), have considered whether legal expenses are paid from the trust corpus as an important factor in determining who is the actual owner of the information and thus possesses the right to control it. See *Riggs Nat'l Bank* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976) ("[T]he payment to the law firm out of the trust assets is a significant factor, not only in weighing ultimately whether the beneficiaries ought to have access to the document, but also it is itself a strong indication of precisely who the real clients were."); see also *Wachtel* v. *Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) ("[W]hen a fiduciary obtains legal advice using its own funds, the payment scheme is an indicator (albeit only an indicator) that the fiduciary is the client, not a representative.").

Here, the legal advice was rendered by government attorneys whose salaries are paid out of congressional appropriations, not the trust corpus. See, *e.g.*, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, Div. E, Tit. I, 123 Stat. 718. The Federal Circuit dismissed that fact as unhelpful because, in "contrast to a private trust case," the United States "imposes the trust on the beneficiaries" in the case of property held for Indians. App. 19a-20a. But that point is of no moment because it is commonplace for even a private trust to be created without the consent of the beneficiaries. 1 Restatement (Second) of Trusts § 36, at 100 (1959) (Restatement of Trusts). And in any event, the United States' distinct role under statutes governing the creation or administration of a trust held for the benefit of Indians simply underscores the uniquely sovereign character of the

United States' functions and the impropriety of subjecting it to rules fashioned at common law. See *Cobell* v. *Salazar*, 573 F.3d 808, 811 (D.C. Cir. 2009) ("[B]ecause 'Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense,' we held that the [statute] did not 'grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee' to order 'the best imaginable accounting without regard to cost.'") (quoting *Cobell* v. *Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005), cert. dismissed, 130 S. Ct. 3497 (2010)).

In addition, both the Federal Records Act of 1950 and Interior Department regulations establish that the government owns the records produced when agency personnel solicit legal advice from government attorneys regarding tribal-trust management. See 44 U.S.C. 2901(1), 3301 (defining "record" as "all * * * documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them"); 25 C.F.R. 115.1000(a)(2) ("Records are property of the United States if they * * * [e]vidence the organization, function, policies, decision, procedures, operations or other activities undertaken in the performance of a federal trust function under this part."). The government's ownership confirms the view that it, not the Tribe, controls access to and assertion of any privilege over those records.

2. *The government does not have a common-law duty to disclose attorney-client privileged communications to Indian tribes*

The Federal Circuit also erred by relying on a private trustee's common-law duty to disclose certain information to a beneficiary. A common-law fiduciary "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person." Restatement of Trusts § 173 cmt. d at 379. Given that no statute or regulation imposes such a generalized duty on the government, there is no basis to extend a fiduciary exception to the tribal trust context that is premised on the existence of such a duty.

a. As discussed above (pp. 12-18, *supra*), in contrast to a private trustee, the government acts in its sovereign capacity when it conducts Indian affairs. That unique status precludes importation of broad common-law trust concepts, especially where those obligations would undermine the government's execution of its sovereign functions. Requiring the government to disclose to tribes otherwise privileged communications between the government and government attorneys would do just that.

Most fundamentally, the Federal Circuit's imposition on the government of a "common law duty to disclose information" (App. 22a) to the Tribe cannot be reconciled with the Court's *Navajo Nation* decisions, which reject the notion that common-law trust principles can create judicially enforceable obligations in the government; only a specific statutory or regulatory mandate can do so. In *Navajo Nation I*, this Court reversed a decision by the Federal Circuit that the level of control

the Secretary exercised over mineral leases was sufficient to demonstrate a money-mandating fiduciary obligation cognizable under the Indian Tucker Act, 28 U.S.C. 1505. 537 U.S. at 501. The Court held that Interior's legal obligations must be based on specific statutes and regulations, and that those at issue did not provide the requisite "substantive law" that mandated federal compensation if breached. *Id.* at 507 (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983) (*Mitchell II*)). In so holding, the Court applied a two-step test for assessing Indian Tucker Act jurisdiction: *first*, a tribe must "identify a substantive source of law that establishes specific fiduciary or other duties" and allege a failure to perform those duties; *second*, if that threshold is met, then the tribe must show that the substantive law "can fairly be interpreted as mandating compensation" for damages caused by a breach. *Id.* at 506 (quoting *Mitchell II*, 463 U.S. at 216-217, 219). Reference to a general trust relationship alone is "insufficient to support jurisdiction under the Indian Tucker Act;" rather, the court must look to the relevant statutes or regulations. *Ibid.*

In 2009, in *Navajo Nation II*, this Court again reversed the Federal Circuit's judgment that the tribe had properly invoked Indian Tucker Act jurisdiction. 129 S. Ct. at 1558. The Federal Circuit had suggested, on remand from *Navajo Nation I*, that the government's "comprehensive control" over coal leasing on tribal lands could give rise to fiduciary duties based on common-law trust principles that are enforceable in court. *Id.* at 1557. Reiterating the two-step test applied in *Navajo Nation I*, this Court rejected that notion. *Id.* at 1558. The Court explained that, absent a clear statutory duty, "neither the Government's 'control' over

coal *nor common-law trust principles* matter." *Ibid.* (emphasis added).

The Federal Circuit's premise in this case that "common law trust principles should generally apply to the United States when it acts as trustee over tribal assets" (App. 16a) cannot be reconciled with the Court's *Navajo Nation* decisions. In those decisions, the Court has twice rejected that mode of analysis in the Indian Tucker Act context, and the Federal Circuit's attempt to resurrect that reasoning in this case for a third time—without any citation, let alone discussion, of either *Navajo Nation* decision—is no more defensible. Other courts of appeals have recognized the unique nature of the government's functions in the administration of Indian affairs as a justification for not importing common-law trust duties into this context. See *Cobell* v. *Salazar*, 573 F.3d at 811 ("Because of the unique nature of this [tribal] trust, we held that 'the common law of trusts doesn't offer a clear path for resolving' the 'ambiguities' involved in setting the parameters of an accounting.") (quoting *Cobell* v. *Norton*, 428 F.3d at 1074); see also *Gros Ventre Tribe* v. *United States*, 469 F.3d 801, 813 (9th Cir. 2006) ("Whatever duty exists at law today must be expressly set forth in statutes or treaties."), cert. denied, 552 U.S. 824 (2007). As the court of appeals that adjudicates the majority of tribal trust cases, the Federal Circuit's continued failure to accept and apply this fundamental principle should not escape this Court's review.

The limited and general statutory mandate for the government to hold tribal funds "in trust" (*e.g.*, 25 U.S.C. 161a(a), 162a(a), 4011(a)) is an insufficient hook for importing broad common-law trust duties such as a generalized duty to disclose all information related to

administration of statutes governing property held in trust. Where this Court has construed a statute to require the United States to "hold the land" allotted for individual Indians "in trust for the sole use and benefit" of those Indians, the Court did not automatically import common-law trust principles even with respect to the property itself, much less the separate issue of disclosure of government records and information. *United States* v. *Mitchell*, 445 U.S. 535, 541 (1980) (*Mitchell I*) (quoting Indian General Allotment Act, 25 U.S.C. 348 (1976)). Instead, the Court interpreted that statute *not* to impose a trust duty to manage allotted forest lands. *Id.* at 546. The statute, at most, created a "bare trust" requiring only limited trust responsibilities. *Mitchell II*, 463 U.S. at 224.

The Federal Circuit's reliance (App. 16a-17a) on *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), was misplaced. In *White Mountain*, the Court interpreted a federal statute as requiring the government, *inter alia*, to preserve tribal property that the statute authorized the government to use for its own purposes. *Id.* at 475; see *id.* at 479-480 (Ginsburg, J., concurring). The government's duties thus arose not from a "general trust relationship" or generic "common-law trust principles," but rather from the unique statute at issue in that case.[9]

---

[9] *White Mountain* was decided the same day as *Navajo Nation I*, and Justice Ginsburg, who authored the latter opinion, joined the Court's opinion in *White Mountain* (a 5-4 decision) based on the express understanding that it was "not inconsistent" with *Navajo Nation I*. *White Mountain*, 537 U.S. at 479 (Ginsburg, J. concurring). Justice Souter, who authored *White Mountain*, acknowledged in dissent in *Navajo Nation I* that the second stage of the inquiry occurs only "once a statutory or regulatory provision is found to create a specific fiduciary obligation." *Navajo Nation I*, 537 U.S. at 514 (Souter, J., dissenting).

b. In light of the Court's emphasis in *Navajo Nation I* and *II* on statutory duties, the absence of any statutory or regulatory duty that Interior disclose confidential communications between the Secretary and government attorneys about tribal trust administration is dispositive and precludes importation of such an obligation based on generic common-law principles. There is no common-law right of access to the government's records or documents, and none of Interior's governing statutes or regulations suggests that the type of material at issue must be made available to Indian tribes.

Congress controls the use of government property under the Property Clause of the Constitution, which gives Congress exceptionally broad power to make rules respecting government property or to confer such power on federal agencies. U.S. Const. Art. IV § 3, Cl. 2; see *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976). Those agencies, like Interior, are governed by statutes and regulations. See, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 937 (1986). As a general matter, Interior is authorized to release copies of official records, papers, or documents within the agency's custody only "when not prejudicial to the interests of the Government." 43 U.S.C. 1460. Other statutory provisions require disclosures of specific information to Indian tribes. See, *e.g.*, American Indian Trust Fund Management Reform Act of 1994 (1994 Trust Reform Act), 25 U.S.C. 162a(d), 4011 (enumerating responsibilities to tribes, including provision of quarterly statements of account performance and an annual audit letter); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1715(a), 1732(b)(2) (specifying that royalty accounting information regarding produc-

tion, removal, or sale of oil or gas from leases on Indian lands must be made available to tribes).[10]

None of those statutes, however, imposes any general duty to provide tribes the government's confidential communications with its own attorneys, even when those communications relate to management of Indian trust funds. To the contrary, the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. I, §§ 2-6, 96 Stat. 1976 (28 U.S.C. 2415 note)—which the Federal Circuit failed to address—recognizes that privileges can be asserted to limit a tribe's access to confidential government communications. That Act established a method for final resolution of certain pre-1966 damages suits brought by the government on behalf of tribes. See §§ 3-6, 96 Stat. 1977; see generally *Oneida County* v. *Oneida Indian Nation*, 470 U.S. 226, 241-244 (1985). Congress provided in that Act that "[u]pon the request of any Indian claimant, the Secretary shall, without undue delay, provide to such claimant any *nonprivileged* research materials or evidence gathered by the United States in the documentation of such claim." § 5(b), 96 Stat. 1978 (emphasis added).

---

[10] The Federal Circuit described the 1994 Trust Reform Act as "expressly recogniz[ing] the possibility of trust responsibilities outside the statute." App. 22a. That Act enumerates eight responsibilities (such as the disclosure obligations described in the parenthetical above) pertaining to the Secretary's administration of tribal trust funds, and states that the Secretary's responsibilities include "but are not limited to" those enumerated therein. 25 U.S.C. 162a(d). The latter clause—which is best read to refer to other statutory and regulatory trust requirements—does not license wholesale importation of common-law trust duties, including a generalized duty to disclose a broad range of information (including privileged information) to the beneficiary, that would render superfluous the Act's specific disclosure obligations.

Similarly, while Interior's regulations require it to disclose certain information to tribes, none of those regulations requires disclosure of confidential communications between the government and its attorneys. Interior, acting through the Office of Trust Fund Management (now part of the Office of the Special Trustee), must provide each tribe, *inter alia*, quarterly statements of account performance, 25 C.F.R. 115.801, 115.803, and, upon a Tribe's request, other information about account transactions and balances, 25 C.F.R. 115.802. And, as noted above (p. 20, *supra*), the regulations establish that records related to the government's trust function are the property of the United States. 25 C.F.R. 115.1000(a).

Indian tribes, like anyone else, must rely on the Freedom of Information Act (FOIA) for access to government records that neither pertinent statutes nor regulations otherwise require Interior to disclose. And significantly, as noted above (note 6, *supra*), Exemption 5, 5 U.S.C. 552(b)(5), would protect attorney-client privileged materials pertaining to tribal trusts from disclosure under FOIA.

c. Along with his responsibilities to Indian tribes, the Secretary must comply with a host of other statutory and regulatory mandates concerning, *e.g.*, the public lands, threatened and endangered fish and wildlife species, and other natural resources that implicate tribes, reservations, or tribal sovereignty. See 43 U.S.C. 1457. Those obligations are sometimes in tension with optimal management of tribal trust assets. The Secretary must manage such potentially competing obligations, and, if necessary, at times subordinate some of the beneficiaries' interests to the Secretary's other interests. See *Nevada*, 463 U.S. at 128. In *Nevada*, for example, the

Court (in a res judicata decision) determined that the United States, as a sovereign, could litigate water rights on behalf of both Indian and competing non-Indian interests without breaching any fiduciary duty to the tribe. *Id.* at 128, 135-138 & n.15.

The various responsibilities the Secretary must perform are materially different from the duty of a private fiduciary at common law, who, in the event of a conflicting interest, owes complete allegiance to the beneficiary. See Restatement of Trusts § 170(1), at 364; George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 543, at 217 (rev. 2d ed. 1980); see also 2A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 170, at 311 (4th ed. 1987) (fiduciary's duty of loyalty is "to administer the trust *solely* in the interest of the beneficiaries") (emphasis added). Accordingly, as the Court observed in *Nevada*, the government "cannot follow the fastidious standards of a private fiduciary." 463 U.S. at 128.

The Federal Circuit incorrectly dismissed *Nevada* as "not relevant" because the government in this case did not specifically argue that it "in fact had to balance competing interests, such as land or mineral rights, in the communications at issue here." App. 18a. That reflects too narrow a reading of *Nevada* and a flawed understanding of the role of the sovereign. Although the present phase of the litigation concerns trust funds rather than real property or natural resources, the government remains uniquely situated as a sovereign. See 1995 OLC Op. 5 ("The role of the government attorney is somewhat more complicated than that of a private attorney: that is, the government attorney may have a higher obligation to 'do justice' and to correct public or societal

wrongs, rather than simply to advocate the position of the attorney's client.").

While perhaps not as overt as the competing water interests at issue in *Nevada*, the government balances a host of statutory and other sovereign obligations when managing trust funds. For example, if an individual Indian is indebted to a tribe, that tribe may obtain a tribal-court judgment against the individual Indian and attempt to enforce the judgment by attaching the individual's trust account. The Secretary—after taking into account the interests of individual Indian account holders, tribal account holders, and the tribal court system—would then have to decide whether to pay the tribal court judgment from the individual's account. This scenario is not just hypothetical: one of the documents required to be disclosed by the decisions below—a memorandum containing legal advice from the Regional Solicitor to an Assistant Area Director of the Bureau of Indian Affairs—addresses analogous circumstances. App. 74a (Doc. No. 37).

In any event, requiring the government, before it may be entitled to the privilege, to determine on a case-by-case or communication-by-communication basis whether it has balanced or will "balance competing interests" is unworkable. In order to be effective, the privilege must be predictable. See, *e.g.*, *Jaffee* v. *Redmond*, 518 U.S. 1, 18 (1996); *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). If government attorneys must engage in such an unpredictable and amorphous inquiry before determining that they and the decisionmakers they advise may rely on the privilege, that is "little better than [permitting] no privilege at all." *Ibid.* Indeed, determining whether any competing obligation

affects a particular trust-related action may be the very point of the attorney-client communication.

B. The Federal Circuit's Decision Threatens Significant Adverse Consequences

1. The Federal Circuit's rule affects more than 90 pending cases seeking billions of dollars from the government

There are currently over 90 cases in which the question presented may arise, and a majority of them are pending in the CFC and thus would be controlled by the Federal Circuit's decision. App. 126a-138a. The Federal Circuit's decision will also govern any future cases brought by tribes or any of the hundreds of thousands of individual Indians for whom the United States holds funds in trust. In this case alone, the Tribe seeks $300 million in damages for the Secretary's alleged breach of fiduciary duties. App. 119a. Collectively, the pending tribal trust cases present billions of dollars in potential liability. This Court has granted review where a case presents "issues of substantial importance concerning the liability of the United States." *Mitchell II*, 463 U.S. at 211 & n.7 ("[T]he damages claimed in this suit alone may amount to $100 million."). And while the question presented does not directly resolve the merits of the underlying claims in this and other cases, forcing the government to give a tribe confidential attorney-client communications surely would impact how the cases will proceed.

2. The Federal Circuit's decision will chill consultation on tribal trust issues

The United States maintains relationships with more than 500 Indian tribes and has responsibilities concern-

ing over 50 million acres of tribal and individual Indian lands and billions of dollars in Indian assets. App. 3a; see U.S. Dep't of the Interior, *About the Department of the Interior: DOI Quick Facts* (Feb. 6, 2009), www.doi.gov/facts.html. By limiting the government's invocation of the attorney-client privilege, the Federal Circuit's decision undermines the ability of government decision-makers to obtain full and frank legal advice concerning those vast resources. Because confidential communications between the agency personnel who administer statutes concerning trust funds and other resources and the government attorneys who advise them could be used against the government, the decision, if allowed to stand, will have a chilling effect on such communications. Given the complex regulatory and other issues involved, the lack of such communications would significantly disrupt the day-to-day administration of statutes affecting tribal trust resources—to the detriment of both the United States and Indians. Cf. *United States* v. *Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999) (suggesting that an uncertain privilege will result in "trustees shying away from legal advice regarding the performance of their duties," an outcome which "ultimately hurts beneficiaries").

That the Federal Circuit's decision leaves open the question whether the privilege applies where the government has identified a "specific competing interest" implicated by the communications at issue (see pp. 28-29, *supra*) does not diminish the need for the Court's review. Notwithstanding the reservation, the category of cases directly controlled by the Federal Circuit's holding is substantial in its own right. Moreover, any potential narrowing effect of that reservation is outweighed by the "substantial uncertainty" it "introduces

* * * into the privilege's application." *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998). What constitutes a "specific competing interest" is not self-evident (especially from the *ex ante* perspective of agency personnel in need of guidance), and to what extent the government would have to show consideration of such an interest in a particular communication is equally uncertain. As this Court has explained, if the purpose of a privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co.*, 449 U.S. at 393. After all, an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Ibid.*

By departing from the Executive Branch's established understanding of the role of its attorneys as representing the United States as a sovereign rather than a particular Indian tribe (pp. 14-17, *supra*), the decision below creates additional uncertainty. Taken to its logical conclusion, the Federal Circuit's denomination of the Tribe as the "real client" raises a plethora of difficult questions pertaining to the professional responsibilities of government attorneys. For example, the attorney's duty to the government might at times conflict with Rule 1.2 of the Model Rules of Professional Conduct, which "requires that a lawyer follow a client's decisions concerning the objectives of representation, mandates that an attorney consult with the client as to means, and requires that the attorney heed a client's decision whether

to accept an offer of settlement." 1995 OLC Op. 4.[11] Although private attorneys may face similar questions, their clients have the option of retaining other counsel to avoid potential conflicts. Not so for Interior and most other agencies, which absent express statutory authorization, are prohibited from retaining outside counsel. See 5 U.S.C. 3106; 1982 OLC Op. 52 (interpreting Section 3106 to "preclude payments to non-agency or non-Justice Department attorneys for (legal) advisory functions"). The potential practical problems posed by the Federal Circuit's reasoning are therefore substantial.

Given the sensitive nature of the question presented and its implications for the ongoing functions of attorneys and others responsible for Indian affairs, the huge monetary awards sought in this and other cases, and the novelty of the Federal Circuit's ruling—as well as that court's disregard of this Court's *Navajo Nation* decisions—the Court should grant review.

[11] Other questions for government attorneys advising on tribal trust matters might include whether the relevant tribal interests would be "directly adverse" to the representation in another suit; whether there is a "significant risk" that protecting tribal interests would be "materially limited" by the government's responsibilities in another suit; or whether a purported conflict has been waived through a tribe's informed consent accompanied by a "reasonabl[e] belie[f]" that the government attorneys could competently protect tribal interests. Model Rules of Prof'l Conduct R. 1.7 (2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

BRIAN C. TOTH
Attorney

HILARY C. TOMPKINS
Solicitor
Department of the Interior

SEPTEMBER 2010

APPENDIX

Supreme Court, U.S.
FILED

10-382 SEP 20 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
BRIAN C. TOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HILARY C. TOMPKINS
Solicitor
Department of the Interior
Washington, D.C. 20460

TABLE OF CONTENTS

		Page
Appendix A	– Court of appeals order (Dec. 30, 2009)	1a
Appendix B	– Court of Federal Claims order (July 2, 2009)	24a
Appendix C	– Order denying rehearing (Apr. 22, 2010)	91a
Appendix D	– Protective order (Feb. 19, 2010)	93a
Appendix E	– First amended complaint (Aug. 26, 2002)	98a
Appendix F	– Letter from Griffin B. Bell to Hon. Cecil D. Andrus (May 31, 1979)	121a
Appendix G	– Pending lawsuit charts	126a
Appendix H	– Statutory and regulatory provisions	139a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MISCELLANEOUS DOCKET NO. 908

IN RE UNITED STATES, PETITIONER

Dec. 30, 2009

On Petition for Writ of Mandamus to the United States Court of Federal Claims in case no. 02-25L, Judge Francis M. Allegra

---

ORDER

Before: LOURIE, FRIEDMAN, and GAJARSA, *Circuit Judges.*

GAJARSA, *Circuit Judge.*

The United States petitions for a writ of mandamus to direct the Court of Federal Claims ("trial court") to vacate its orders requiring the United States to produce documents that it asserts are protected by the attorney-client privilege. Jicarilla Apache Nation ("Jicarilla") opposes. We hold that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications

concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications. Accordingly, we adopt the fiduciary exception in tribal trust cases. Under the fiduciary exception, a fiduciary may not block a beneficiary from discovering information protected under the attorney-client privilege when the information relates to fiduciary matters, including trust management. Because we find that the trial court correctly applied the fiduciary exception to the United States' privileged communications, we deny the United States' petition for a writ of mandamus.

BACKGROUND

Jicarilla sued the United States in the Court of Federal Claims for a breach of fiduciary duties, alleging that the United States mismanaged the tribe's trust assets and other funds. *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 4 (2009). The trial court divided the case into phases. The first phase only concerns the government's management of Jicarilla trust accounts from 1972 to 1992. *Id.* During this phase, the tribe moved to compel discovery of documents related to the management of the trust funds that the United States asserted were protected by the attorney-client privilege, the work-product doctrine, and the deliberative process privilege. *Id.* In response, the United States "agreed to produce 71 of the 226 documents listed in its privilege log based, in part, upon withdrawing any deliberative process privilege claims," but maintained its privilege claims over the remaining 155 documents. *Id.* Per court order, the trial court reviewed the remaining 155 documents *in camera*. *Id.*

The trial court held that the United States could not deny Jicarilla's request to discover communications between the United States and its attorneys based on the attorney-client privilege because those communications were subject to the fiduciary exception. *Id.* at 11-12. The trial court explained that under the fiduciary exception, "fiduciaries may not shield from their beneficiaries communications between them and their attorneys that relate to fiduciary matters, including the administration of trusts." *Id.* at 10. According to the trial court, the fiduciary exception applied to the "'general trust relationship between the United States and the Indian people,' which comprises a 'distinctive obligation of trust incumbent upon the Government.'" *Id.* at 6 (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1982)). The trial court opined that "basic trust principles are readily transferable to" the United States' fiduciary relationship with Indian tribes. *Id.* at 11-12. The trial court noted that Congress had enacted legislation appointing the United States as trustee over "56 million acres of land and billions of dollars in tribal assets" and created an Office of Special Trustee "to ensure that each tribe received as complete a trust fund accounting as soon as possible." *Id.* at 5 (citing 25 U.S.C. §§ 4041-44 (2006)). Though statutes undoubtedly "delimit somewhat the government's obligations," the trial court explained that the U.S. Supreme Court had evaluated the fiduciary relationship using principles of common law and had judged tribal trust cases with the "'most exacting fiduciary standards.'" *Id.* at 6 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

With these principles in mind, the trial court applied the fiduciary exception, requiring the United States to produce many of the documents that were not otherwise

protected as work product. *Id.* at 13-19. The trial court organized the documents that Jicarilla requested into five categories, including (1) Department of the Interior ("Interior") personnel requests for advice from the Interior Solicitor's Office ("Solicitor's Office") on administration of tribal trusts, (2) Solicitor's Office advice to Interior and Department of the Treasury ("Treasury") personnel, (3) accounting firm Arthur Andersen LLP documents generated under contracts with Interior, (4) Interior documents concerning litigation with tribes other than Jicarilla, and (5) miscellaneous documents such as cover sheets and other documents not falling into the other categories. *Id.* at 6. The court applied the fiduciary exception to all the documents in the first category except for duplicates because the "documents involve matters regarding the administration of tribal trusts, either directly or indirectly implicating the investments that benefit Jicarilla." *Id.* at 14. With few exceptions, the trial court also applied the fiduciary exception to documents in the second category because the documents contained "legal advice relating to trust administration." *Id.* at 16. In contrast to the first two categories, the trial court allowed the United States to withhold most of the documents in the third category from production as attorney work product. *Id.* at 17-18. As to the fourth category, the trial court allowed the United States to withhold most of the documents as work product, but required the government to produce four documents with the exception of two footnotes. *Id.* at 18. According to the trial court, those documents either did not constitute attorney work product at all or, if privileged, were subject to the fiduciary exception. *Id.* Finally, the trial court required the United States to produce two documents that fell under the fiduciary excep-

tion in the fifth category because the documents concerned trust management and various cover sheets that did not appear to be protected by either the attorney-client privilege or the work-product doctrine. *Id.* at 19.

The United States now petitions for a writ of mandamus to vacate the trial court's order requiring production of the above documents under the fiduciary exception. We have jurisdiction pursuant to 28 U.S.C. § 1651(a).

DISCUSSION

This court has the authority to issue a writ of mandamus against a lower court under common law as codified in the All Writs Act. "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). Mandamus is available only in extraordinary cases to correct a lower court's usurpation of judicial power or clear abuse of discretion. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *see also In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996). A party seeking a writ of mandamus bears the burden of proving that it has no other means of attaining the relief desired, *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989), and that its "right to issuance of the writ is 'clear and indisputable,'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899)). Accordingly, the writ is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)).

Notwithstanding the extraordinary nature of mandamus, this court has issued the writ in appropriate cases "to prevent the wrongful exposure of privileged communications." *Regents*, 101 F.3d at 1387; *see also Mohawk Indus., Inc. v. Carpenter*, 78 U.S.L.W. 4019, 4022 (U.S. Dec. 8, 2009) (noting that an appellate court may grant a writ of mandamus to correct a "particularly injurious or novel privilege ruling"). "Specifically, 'mandamus review may be granted of discovery orders that turn on claims of privilege when (1) there is raised an important issue of first impression, (2) the privilege would be lost if review were denied until final judgment, and (3) immediate resolution would avoid the development of doctrine that would undermine the privilege.'" *In re Seagate Tech., LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (quoting *Regents*, 101 F.3d at 1388). Accordingly, mandamus may be appropriate to correct a lower court that ordered a party to produce documents in violation of the attorney-client privilege. *See id.* at 1375-76 (granting mandamus to correct a district court that held a party had waived the attorney-client privilege protecting trial counsel's client communications and work product by asserting the advice-of-counsel defense in patent infringement suit); *Regents*, 101 F.3d at 1390-91 (granting mandamus to correct a district court that misconstrued the community of interest doctrine by ordering patent licensee's in-house counsel to testify about advice given to patentee during prosecution when licensee and patentee entered into an exclusive option contract and in-house counsel assumed responsibility for patent prosecution).

As a matter of first impression, the United States petitions for a writ of mandamus, asserting, inter alia, that the fiduciary exception does not apply to it because

its relationship to the tribe is different than a traditional fiduciary relationship. The United States explains that the fiduciary exception is based on two primary rationales, including (1) the fiduciary's duty of loyalty to the beneficiaries and (2) the fiduciary's duty to provide information to beneficiaries. Based on these rationales, the United States argues the following: First, it argues that the fiduciary exception's rationales should not apply to its duties to tribes because the United States has competing interests to consider when administering the trust. Second, the United States argues that the attorney-client privilege should protect the documents here because the payment for the legal services did not come from the trust corpus. Third, the United States argues that applying the exception to the attorney-client privilege would improperly impair its ability to seek confidential legal advice. Finally, the United States argues that it does not have a fiduciary duty to disclose information to beneficiaries.

The United States' petition for mandamus thus asks us to interpret the bounds of the attorney-client privilege. This court interprets privileges on a case-by-case basis according to "principles of the common law" when federal law is at issue. Fed. R. Evid. 501; *see also Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981). Accordingly, we will begin with a summary of the attorney-client privilege and the fiduciary exception before examining how the privilege should apply in this case.

I. The Attorney-Client Privilege and the Development of the Fiduciary Exception

The attorney-client privilege is the client's right to refuse to disclose confidential "communications between attorney and client made for the purpose of obtaining legal advice." *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); *Black's Law Dictionary* 1235 (8th ed. 2004). The privilege "encourag[es] full and frank communication between attorneys and their clients" and "recognizes that sound legal advice . . . depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But the privilege "belongs to the client, who alone may waive it." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (en banc). An attorney may not assert the privilege against the client's wishes or against the client himself. *See Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987) ("The privilege is that of the client, not that of the attorney.").

While "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," *Upjohn*, 449 U.S. at 389, it is not "an ironclad veil of secrecy," *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970). The Supreme Court has recognized exceptions to the privilege, for example, holding that it does not protect communications made in the furtherance of a crime or fraud. *See United States v. Zolin*, 491 U.S. 554, 562-63 (1989) ("[T]he purpose of the crime-fraud exception to the attorney-client privi-

lege [is] to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." (internal quotation marks omitted)); *see also In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807 (Fed. Cir. 2000) (discussing the crime-fraud exception). Moreover, we have recognized the joint client or community of interest doctrine: "When the same attorney represents the interests of two or more entities on the same matter, those represented are viewed as joint clients for purposes of privilege." *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996). Under this doctrine, "communications between a client and the attorney may be privileged as to outsiders, [but] they are not privileged" between clients in a community of interest relationship. *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007). Several courts have recognized another limitation on the attorney-client privilege, known as the fiduciary exception.

As early as 1855, English courts required a trustee to produce legal advice to a beneficiary when the beneficiary sued the trustee for mismanagement and the advice related to trust administration. *Devaynes v. Robinson*, 20 Beav. 42, 43, 52 Eng. Rep. 518, 518 (1855) ("[C]ases and opinions taken by the . . . trustees must be produced" to the beneficiaries as long as the trustee did not obtain them in contemplation of litigation); Recent Cases, *In re Whitworth*, 1 Ch. 320 (1919), 33 Harv. L. Rev. 120 (1919). However, the attorney-client privilege still applied to advice that the trustee sought in anticipation of litigation. *Id.* After *Devaynes*, English courts have followed the so-called exception to the attorney-client privilege in beneficiary suits against a trustee for trust mismanagement. *See, e.g., Talbot v.*

Marshfield, 2 Dr. & Sm. 549, 551 62 Eng. Rep. 728, 729 (1865) ("[I]f a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any [beneficiary] a right to see the case and opinion."); *Wynne v. Humbertson*, 27 Beav. 421, 423, 54 Eng. Rep. 165, 166 (1858) ("[T]he rule is that, where the relation of trustee and [beneficiary] is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defense in any litigation . . . , must be produced to the [beneficiary]."); *In re Mason*, 22 Ch. D. 609, 609 (1883) (holding that the trustees must produce documents containing "communications by and to the trustees and their solicitors in relation to the trust estate, made before the action was brought"). These English courts reasoned that a beneficiary was entitled to access the advice of counsel because the trustee sought the advice on how to execute the trust for the beneficiary's benefit and because the trust fund paid for the advice. *See Wynne*, 27 Beav. at 423-24, 54 Eng. Rep. at 166; *Talbot*, 2 Dr. & Sm. at 550-51, 62 Eng. Rep. at 729.

Though much later, courts in the United States also adopted the fiduciary exception. In 1970, the Fifth Circuit held that shareholders could pierce a corporation's attorney-client privilege to discover legal advice given to corporate management in a suit for breach of fiduciary duty upon a showing of good cause. *Garner*, 430 F.2d at 1103-04. The Fifth Circuit identified nine factors courts should consider in finding good cause. *Id.* at 1104.[1] In

---

[1] The nine *Garner* factors are as follows:

[1] [T]he number of shareholders and the percentage of stock they

reaching its conclusion, the court recognized that a corporation or its managers may sometimes have conflicting interests with shareholders and that shareholders may have conflicting interests among themselves. *Id.* at 1101 & n.17. "But when all is said and done management is not managing for itself," rather it "has duties which run to the benefit ultimately of the stockholders." *Id.* at 1101. Analogizing to the crime-fraud exception and the community of interest doctrine, the Fifth Circuit reasoned that the attorney-client privilege had limits when the person seeking legal advice had a superseding obligation to shareholders or some other client was entitled to the advice. *Id.* at 1103.

Since *Garner*, U.S. courts have applied the fiduciary exception in contexts other than derivative shareholder actions. For example, courts have applied the exception in trust cases when trustees assert the attorney-client privilege against beneficiaries, as in the leading American case *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976). Courts have also relied on

---

represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Garner, 430 F.2d at 1104.

the exception in other fiduciary relationships, such as when employers managing plans regulated under the Employee Retirement Income Security Act (ERISA) have asserted privilege against plan beneficiaries and when unions have asserted privilege against union members. *See Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 271-72 (2d Cir. 1997) (employer acting as an ERISA fiduciary asserting privilege against plan beneficiaries); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 679-81 (D. Kan. 1986) (union asserting privilege against union members).

The fiduciary exception to the attorney-client privilege is now well established among our sister circuits. At least five circuits recognize some form of the exception, including the Second, Fifth, Sixth, Ninth, and D.C. Circuits. *See, e.g., United States v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999); *In re Lindsey*, 158 F.3d 1263, 1276-79 (D.C. Cir. 1998); *Becher*, 129 F.3d at 272 (recognizing the fiduciary exception in the Second Circuit); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992); *Fausek v. White*, 965 F.2d 126, 132-33 (6th Cir. 1992); *cf. Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 352 (4th Cir. 1992), *vacated*, No. 91-1873(L), 1993 WL 524680 (4th Cir. Apr. 7, 1993). Though we are aware of some state courts that have expressly rejected the fiduciary exception, no federal court of appeals has rejected the principle, but have only declined to apply the exception in cases where the facts did not justify its application. *Compare Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591, 594-96 (Cal. 2000) (rejecting the fiduciary exception in a trustee-beneficiary case because statutory attorney-client privilege did not permit judicially created exceptions), *and Huie v. DeShazo*, 922 S.W.2d 920, 922-25 (Tex. 1996) (rejecting the fiduciary exception in

a trustee-beneficiary case), *with Wachtel*, 482 F.3d at 236-37 (declining to apply the fiduciary exception to an insurer who sells, but does not manage, insurance to ERISA-regulated parties), *and Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 788-89 (7th Cir. 2005) (declining to apply the fiduciary exception to an employer amending or terminating an ERISA plan), *and Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1415-16 (11th Cir. 1994) (declining to apply the *Garner* doctrine to a union in a suit brought by union members because only a tiny percentage of union members were members of the class and the union class members' interests conflicted with union members not in the class).

As developed in the United States, courts have based the fiduciary exception on two justifications. *See Riggs*, 355 A.2d at 712-14. First, the fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary. *See, e.g., Mett*, 178 F.3d at 1063 ("[A]t least as to advice regarding plan administration, a trustee is not the real client and thus never enjoyed the privilege in the first place." (internal quotation marks omitted)); *Riggs*, 355 A.2d at 713 ("As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served."). Under this justification, the fiduciary exception is but a logical extension of the client's control of the attorney-client privilege. Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary. *See e.g., Becher*, 129 F.3d at 72 ("[An] ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan."); *Riggs*, 355 A.2d at 714 ("[T]rustees . . . cannot subordinate the fiduciary obli-

gations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege."). Under this second justification, "the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle," the duty to disclose. *Mett*, 178 F.3d at 1063.

No federal court of appeals has addressed whether the fiduciary exception applies to the United States as trustee over tribal assets and funds. However, federal trial courts have previously applied the fiduciary exception to the United States in at least three tribal trust cases—twice in the Court of Federal Claims and once in a district court. *See Osage Nation v. United States*, 66 Fed. Cl. 244, 247-53 (2005); *Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002); *Shoshone Indian Tribe of Wind River Reservation, Wy. v. United States*, Nos. 458-79 and 459-79 (Fed. Cl. May 16, 2002), *attached at Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 35 (2009). With this background in mind, we now turn to the question that the United States raises in its petition.

II. The Fiduciary Exception Applied to Indian Trusts

The United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception. Therefore, we hold that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications.

The United States' general assertion that the Secretary of the Interior's other statutory obligations "may occasionally be in tension with interests regarding tribal lands or other non-monetary assets," does not diminish its exacting responsibilities as a trustee so as to warrant shielding the trust beneficiary from legal advice on trust management. Accordingly, we adopt the fiduciary exception in tribal trust cases. We do not address whether the fiduciary exception applies when the government or its attorneys considered a specific competing interest in those communications, such as statutes governing endangered species or natural resources. Nor do we address whether the fiduciary exception applies to documents privileged as attorney work product. In the case before us, however, both justifications for the fiduciary exception support its application.

A. Identity of the Client

As the Court of Federal Claims described, the attorney-client communications at issue here were for the benefit of Jicarilla and other Indian tribes. *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 6, 13-19 (2009). Interior was seeking advice on behalf of the tribes on how to manage trust funds and other tribal assets, and the attorneys were giving advice on trust management ultimately for the benefit of the tribes. Accordingly, Interior was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes.

Jicarilla's status as the "real client" stems from its trust relationship with the United States. *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976). The Supreme Court has affirmed "the undis-

puted existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *see also Cherokee Nation v. Ga.*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing the relationship of the Indian tribes to the United States as "ward to his guardian" and clearly establishing the now longstanding and accepted basis of the trust relationship between the United States and Indian tribes). "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* This general trust relationship rests on a long history of asset management and statutory mandates to Interior. As the trial court noted, "'Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.'" *Jicarilla*, 88 Fed. Cl. at 5 (quoting Felix Cohen, *Handbook of Federal Indian Law* § 5.04(4)(a) (2005)). We think that the statutes that the trial court cites amply demonstrate that relationship. *See id.*; *see also* 25 U.S.C. § 162(a) (2006) (trust investment); § 450j (contract administration); § 458cc (funding agreements); § 3120 (forest resources); § 3303 (education); § 3701 (agricultural resources); § 4021 (trust fund management); §§ 4041-43 (special trustee). Indeed, like the fiduciary duties in other statutory trusts, the United States' trust duties to tribes "draw much of their content from the common law of trusts." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (comparing fiduciary duties under ERISA to the common law of trusts). Accordingly, common law trust principles should generally apply to the United States when it acts as trustee over tribal assets. *See United States v. White Mtn. Apache Tribe*, 537 U.S.

465, 475 (2003) (applying the common law principle that a trustee must preserve the trust corpus to the United States as trustee of tribal assets); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) (applying the common law principle of trustee repudiation to the United States as trustee of tribal assets). Moreover, the general trust relationship justifies straightforward application of the fiduciary exception in this case, instead of the multifactor balancing test that courts apply in derivative shareholder actions. *Compare Wynne v. Humbertson*, 27 Beav. 421, 423, 54 Eng. Rep. 165, 166 (1858) (fiduciary exception applied in trust case), *and Riggs*, 355 A.2d at 712-14 (same), *with Garner*, 430 F.2d at 1104 (shareholder derivative action identifying nine factors for good cause to pierce attorney-client privilege). We find the government's arguments to the contrary unpersuasive and address each in turn.

1. Duty of Loyalty to the Tribes

The United States relies primarily on *Nevada v. United States*, 463 U.S. 110 (1983) for its argument that its relationship with the tribes is very different from a traditional fiduciary's relationship to beneficiaries.

In *Nevada*, the Supreme Court held that res judicata barred an action by the United States in 1973 seeking additional water rights on behalf of the Pyramid Lake Indian Reservation because the United States had already sued in 1913 to adjudicate those same water rights. *Id.* at 143. The Court also addressed the United States' obligations to the reservation and its obligation to comply with the Reclamation Act of 1902. The Reclamation Act "required the Secretary of the Interior to

assume substantial obligations with respect to the reclamation of arid lands in the western part of the United States." *Id.* at 128. The Court explained that the United States would not violate its trust obligations to a tribe by performing another task also required in the Reclamation Act. The Court noted that Congress delegated to the Secretary of the Interior "both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands." *Id.* Based on this dual responsibility, the Court wrote that "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well." *Id.* The Court thus reasoned that this dual responsibility altered the government's duties as a fiduciary: "[T]he Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent." *Id.*

The United States' reliance on *Nevada* and its argument that other statutory duties undermine application of the fiduciary exception are not relevant in this case. To be sure, *Nevada* recognizes that the Secretary of the Interior may at times be required to balance fiduciary duties with other statutory duties. However, the government does not argue in its petition that it in fact had to balance competing interests, such as land or mineral rights, in the communications at issue here. We note that this is the trust *funds* phase of the case. According to the parties, this phase involves only the management of accounts, not of other assets such as land or mineral rights, where the Secretary of the Interior might have

other statutory duties. The Navajo Nation and Pueblo of Laguna, as amici curiae, correctly note that "[s]ince the documents at issue relate only to trust *funds*, potential privilege claims for unspecified documents regarding other types of trust assets based on other statutory regimes are beyond the scope of the petition." Thus, we do not reach the issue whether the fiduciary exception applies when the government or its attorneys considered a specific competing interest in those communications.

2. Source of Payment for Legal Advice

The United States also argues that because its attorneys are paid "out of congressional appropriations, not the trust corpus," their relationship with the tribes should not allow application of the fiduciary exception. The United States explains that "[w]hile the source of payment [for legal advice] may not, by itself, determine whether the fiduciary exception applies, it does serve as another factor counseling against application of the exception in this context."

The United States correctly identifies the source of payment as one factor in determining whether a beneficiary can access attorney-client privileged information. *See, e.g.*, *Wachtel v. Health Net, Inc.*, 482 F.2d 225, 235-36 (3d Cir. 2007) ("[W]hen a trustee pays counsel out of trust funds, rather than out of its own pocket, the payment scheme is strongly indicative of the beneficiaries' status as the true clients."); *Riggs*, 355 A.2d at 712 ("[W]hen the beneficiaries desire to inspect opinions of counsel for which they have paid out of trust funds effectively belonging to them, the duty of the trustees to allow them to examine those opinions becomes even more compelling."). In contrast to a private trust case, we do

not think the source of payment is helpful when the trustee imposes the trust on the beneficiaries. The fact that the United States does not use trust funds to pay for legal advice on how to manage a trust it imposed on the Indian tribes does not suggest that the tribes should be barred from accessing that advice. Moreover, the government's fiduciary duties of providing Jicarilla "with complete and accurate information overrides any implication that must arise from the fact that the [g]overnment pays its own legal fees." *Osage Nation v. United States*, 66 Fed. Cl. 244, 249 (2005) (internal quotation marks omitted) (alterations in the original).

3. Secretary of the Interior's Ability to Obtain Confidential Legal Advice

The United States also argues that applying the fiduciary duty in this case would impair the Secretary of the Interior's ability to obtain confidential legal advice. Because this phase of the litigation involves only the United States' duties regarding trust fund accounts, we disagree with the government's position. Of course, the basic concern could be stated by any trustee. The trustee may feel that its ability to obtain legal advice is impaired because the advice is not shielded from its beneficiary. But the exception applies because the fiduciary is not the exclusive client of the attorney rendering advice and because a fiduciary has a duty to keep the beneficiary informed of issues related to trust administration. Though the United States argues that it would not be able to obtain legal advice about other statutes that may require it to take action related to property that is not a trust fund account, those arguments are not relevant in this case and it has failed to allege any actual conflict.

B. Duty of Disclosure

The fiduciary exception's second justification also supports applying the doctrine in this case. As a general trustee, the United States has a fiduciary duty to disclose information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds. *See* Restatement (Third) of Trusts § 82(2) (2007) ("[A] trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings."); Restatement (Second) of Trusts § 173 (1959) ("The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust."). In addition to that basic duty, Congress has created an Office of Special Trustee "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes." 25 U.S.C. § 4041(1) (2006).

The United States argues that it does not have a fiduciary's duty to disseminate information to the tribes because Congress has required Interior to provide only specific types of information to tribes. The United States cites the 1994 Indian Trust Fund Management Reform Act, which required, inter alia, that Interior must provide certain information to tribes, including

quarterly statements of performance and a letter reporting the results of an audit. The United States did not identify the pertinent language of the statute, which states that "proper discharge of the trust responsibilities of the United States *shall include (but are not limited to)* . . . [p]reparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis." 25 U.S.C. § 162a(d)(5) (emphasis added). Congress expressly recognized the possibility of trust responsibilities outside the statute. Therefore, the United States' arguments in this regard are completely without merit.

The D.C. Circuit came to a similar conclusion based on the United States' arguments that statutes have limited the United States' fiduciary duties to the tribes. That court wrote, "The fundamental problem with [the government's] claims is the premise that their duties are solely defined by the 1994 Act. The Indian Trust Fund Management Reform Act reaffirmed and clarified preexisting duties; it did not create them." *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001).

In sum, "the government has other trust responsibilities not enumerated in the 1994 Act." *Id.* Those other responsibilities include the common law duty to disclose information.

CONCLUSION

The United States has not shown that the Court of Federal Claims erred in determining that the government could not withhold documents related to the management of trust fund accounts from Jicarilla based on the attorney-client privilege. The United States' right

to issuance of the writ is far from "clear and indisputable," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (internal quotation marks omitted), because the government improperly asserted the attorney-client privilege as a trustee against the trust beneficiaries. We thus decline to grant a writ of mandamus. Instead of "avoid[ing] the development of doctrine that would undermine the [attorney-client] privilege," *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), the trial court correctly demarcated the privilege's limits.

Accordingly,

IT IS ORDERED THAT:

(1) The petition for a writ of mandamus is denied.

(2) The motion for leave to file a reply is granted.

(3) The motion for leave to file a shortened brief amicus curiae is granted. The original motion for leave to file a brief amicus curiae is moot.

(4) The temporary stay of the order of the Court of Federal Claims that required production is lifted.

FOR THE COURT

December 30, 2009
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

cc: Brian C. Toth, Esq.
Steven D. Gordon, Esq.
Alan R. Taradash, Esq.
Judge, Court of Federal Claims
Clerk, Court of Federal Claims

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-25L

JICARILLA APACHE NATION, FORMERLY
JICARILLA APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

(Filed under seal: July 2, 2009)
Reissued: July 21, 2009[1]

Motion to compel production; Motion for protective order; Tribal trust fund case—fiduciary obligations; Attorney-client privilege; Work product doctrine; "Fiduciary exception;" Applicability to attorney-client privilege; Inapplicability to work product doctrine; Mixed-content documents; Requests for legal advice; Applicability of attorney-client privilege to advice received from agency counsel; RCFC 26(b)(5)(A)—waiver of privilege; RCFC 26(b)—relevancy; Tribal investment information not relevant to trust fund theories; Motions granted, in part, denied, in part

---

[1] An unredacted version of this opinion was issued under seal on July 2, 2009. The parties were given an opportunity to propose redactions, but no such proposals were made.

ORDER

ALLEGRA, Judge:

Pending before the court, in this tribal trust case, are myriad discovery-related motions. Plaintiff seeks to compel the production of documents that defendant claims are privileged and, at the same time, seeks a protective order to prevent the discovery of investment information it claims is irrelevant to the subject case. Defendant resists both motions and, for its own part, has filed motions to compel the production of the information that plaintiff seeks to protect and to modify substantially the discovery plan in this case.

I.

A brief recitation of the underlying facts sets the context for this decision.

In this case, the Jicarilla Apache Nation (Jicarilla or plaintiff) seeks an accounting and to recover for monetary loss and damages relating to the government's breach of fiduciary duties in allegedly mismanaging the tribe's trust assets and other funds. Plaintiff, *inter alia*, avers that defendant failed to maximize returns on its trust funds, invested too heavily in short-term maturities, and failed to pool its trust funds with other tribal trusts. The parties participated in alternative dispute resolution from December 2002 to June 2008, during which time defendant produced many thousands of documents to Jicarilla. Defendant, however, also withheld a large number of documents as privileged. Ultimately, at

the plaintiff's request, the case was restored to the court's active docket. Following consultations with the parties, on October 7, 2008, the court issued an order confirming that trial on the first phase of the case would be limited to fiscal claims relating to defendant's management of certain Jicarilla trust accounts from 1972 to 1992 (the Andersen Period).

Discovery as to that phase of the case ensued. On November 25, 2008, plaintiff filed a motion to compel defendant to produce certain documents withheld from production based on claims of attorney-client privilege, attorney work-product, and the deliberative process privilege. On December 19, 2008, defendant filed its response to the motion and a privilege log. In those documents, defendant continued to assert attorney-client and work-product defenses, but agreed to produce 71 of the 226 documents listed in its privilege log based, in part, upon withdrawing any deliberative process privilege claims. Plaintiff filed its reply on January 5, 2009, and on January 16, 2009, defendant, per court order, submitted 155 documents for *en camera* review.[2]

On February 25, 2009, plaintiff filed a motion for a protective order to bar defendant from discovering information relating to the tribe's non-trust investments. Plaintiff vigorously asserted, *inter alia*, that the tribe's handling of its non-trust investments is irrelevant to this lawsuit. On March 5, 2009, defendant responded to the motion, asserting that the requested documents were reasonably calculated to lead to the discovery of admis-

---

[2] The Supreme Court has recognized the important role that *en camera* inspection of disputed documents often plays in determining the existence of a privilege. *See United States v. Zolin*, 491 U.S. 554, 568-69 (1989); *see also United States v. Nixon*, 418 U.S. 683, 714 (1974).

sible evidence concerning the reasonableness of the government's investments as trustee, the tribe's investment directives and liquidity needs, the receipt and timing of trust disbursements, and potential damages calculations. On March 11, 2009, Pueblo of Laguna and Navajo Nation, which are plaintiffs in two similar cases pending before the court, filed an *amicus* brief in support of plaintiff's motion. Plaintiff filed its reply on March 13, 2009. Hoping to ensure production of the same information plaintiff seeks to protect, defendant filed a motion to compel on March 17, 2009. On March 19, 2009, it filed a response to the *amicus* brief. Plaintiff filed its response to defendant's motion to compel on April 3, 2009. On April 10, 2009, the *amici* filed a brief opposing defendant's motion, and defendant filed its reply.

On March 31, 2009, defendant filed a motion to extend the discovery deadlines in this case by one year, claiming the extra time is needed given the breadth of the discovery requested and the vast size of the record depositories to be searched. Plaintiff filed its response opposing the request on April 14, 2009, alleging that most repositories have been canvassed, thousands of documents already produced, and the issues known for years. Defendant filed its reply on April 16, 2009. Oral argument on all the discovery motions was held on April 16, 2009. Following oral argument, and per court order, defendant filed the deposition transcript of a former tribal assistance officer, Mr. Gabriel Abeyta, and associated exhibits on April 22, 2009. The court permitted supplemental materials to be filed by *amici* on May 4, 2009; by plaintiff on May 5, 2009; and by defendant on May 4 and May 14, 2009.

II.

The Federal Circuit has instructed that "[q]uestions of the scope and conduct of discovery are . . . committed to the discretion of the trial court." *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 797 (Fed. Cir. 1984); *see also Stovall v. United States*, 85 Fed. Cl. 810, 813 (2009). In deciding either to compel or quash discovery, this court must balance potentially conflicting goals. On the one hand, it "'must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.'" *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1024 (Fed. Cir. 1986) (quoting Fed. R. Civ. P. 26(b)(1) advisory comm. notes (1983)); *see also Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (per curiam). As the Supreme Court once famously indicated, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). On the other hand, the Court in *Hickman* was quick to caution that "discovery, like all matters of procedure, has ultimate and necessary boundaries. . . . [L]imitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege." *Id.* at 507-08; *see also Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 126 (2007); *Vons Cos., Inc. v. United States*, 51 Fed. Cl. 1, 5 (2001). Encapsulating these considerations, RCFC 26(b)(1), like its Federal Rules counterpart, provides that a party may obtain discovery of any matter that: (I) is "non-privileged," and (ii) "is relevant to any party's claim or defense." *See also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1300 (Fed. Cir. 2006),

cert. denied, 549 U.S. 1096 (2006); *Evergreen Trading*, 80 Fed. Cl. at 126; *Vons*, 51 Fed. Cl. at 5.

The fiduciary relationship between the federal government and Indian tribes took form long ago, arising first under treaties and then under statutes. As early as 1831, Chief Justice Marshall described the relationship of the tribes with the United States as that of a "ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Early acts by Congress effectuated this view by specifically directing how the government would handle tribal trust funds. *See, e.g.*, Act of June 14, 1836, 5 Stat. 36 (rates of return); Act of Jan. 9, 1837, 5 Stat. 135 (interest on land proceeds). In the 1877 General Allotment Act, Congress appointed the United States, as trustee, to manage lands allotted for individual Native Americans and to deposit fees and royalties from use of those lands into trust accounts. 24 Stat. 388 (1887), *codified at*, 25 U.S.C. § 331, *et seq.* Although the Indian Reorganization Act of 1934 barred further allotments, federal trust obligations continued for previously allotted lands. 48 Stat. 984 (1934), *codified at*, 25 U.S.C. § 461, *et seq.* Through these and later enactments, the United States has come to manage 56 million acres of land and billions of dollars in tribal assets, collecting hundreds of millions of dollars annually on behalf of the tribes from leases, as well as mineral, timber, oil, and gas royalties. *See* Felix Cohen, Handbook of Federal Indian Law (Cohen) § 5.03(3)(b) (2005); Dep't of Interior, Fiduciary Obligations Compliance Plan, Jan. 6, 2003, http://www.doi.gov/news/fiduciaryobligations.pdf (as viewed on July 2, 2009); Robert McCarthy, "The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians," 19 BYU J. Pub. L. 1, 78 (2004).

Over the last century, Congress has seen fit periodically to reaffirm the importance of the government's fiduciary role in managing tribal assets. "Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government." Cohen, *supra* at §5.04(4)(a); *see e.g.*, 25 U.S.C. § 162a (trust investment), § 450j (contract administration), § 458cc (funding agreements), § 3120 (forest resources), § 3303 (education), § 3701 (agricultural resources), § 4021 (trust fund management) §§ 4041-43 (special trustee). When it has perceived deficiencies in the government's handling of trust assets, Congress has not hesitated to pass laws to bolster the protection of tribal investments, often by giving the tribes increased access to investment information. *See, e.g.*, American Indian Trust Fund Management Reform Act of 1994 (Trust Fund Reform Act), Pub. L. No. 103-412, 108 Stat. 4239 (1994), *codified at* 25 U.S.C. §§ 4001-61; *see also* Misplaced Trust: the Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 (1992). Of particular importance in this regard is the Trust Fund Reform Act, which required that the Department of Interior (Interior) account for all Indian trust funds, report quarterly to account holders, and conduct annual audits. The act, *inter alia*, created an Office of Special Trustee to provide greater accountability in discharging trust responsibilities and to ensure that each tribe received as complete a trust fund accounting as soon as possible dating back to the earliest practicable date. 25 U.S.C. §§ 4041-44.

Commenting, from time to time, on various chapters of this history, the Supreme Court has noted the "distinctive obligation of trust incumbent upon the Govern-

ment in its dealings with these dependent and sometimes exploited people," *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), and, more recently, the "undisputed existence of a general trust relationship between the United States and the Indian people," which compromises a "distinctive obligation of trust incumbent upon the Government," *United States v. Mitchell*, 463 U.S. 206, 225 (1982).[3] Though this relationship is currently founded in statutes that undoubtedly serve to delimit somewhat the government's obligations, it has, nevertheless, historically been measured and evaluated using principles typically applied to common law fiduciary relationships. *See, e.g.*, *White Mountain*, 537 U.S. at 475; *Shoshone*, 364 F.3d at 1348 (applying traditional trust principles). Indeed, a leitmotif oft sounded in tribal trust cases is that defendant's conduct must be judged by the "most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see also Shoshone*, 364 F.3d at 1348; *Ak-Chin v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982); *Osage Tribe v. United States*, 72 Fed. Cl. 629, 643 (2006). Thus, defendant is obliged "to preserve and maintain trust assets," *White Mountain*, 537 U.S. at 475 (quoting *Central States, Southwest & Southwest Areas Pension Fund v. Central Transp. Inc.*, 472 U.S. 559, 572 (1985)), and to provide the beneficiaries

---

[3] *See also id.* (noting that the relevant sources of substantive law create "[a]ll of the necessary elements of a common-law trust"); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 n.3 (2003); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, 665-66 (7th Cir. 2004), cert denied, 543 U.S. 1051 (2005); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004), cert. denied, 544 U.S. 973 (2005).

with information regarding the management of their trusts, *see Navajo Tribe of Indians v. United States*, 624 F.2d 981, 989 (Ct. Cl. 1980); *Red Lake Band v. United States*, 17 Cl. Ct. 362, 373 (1989); *see also* Restatement (Third) Trusts §§ 82-83.

III.

With this background, we deal first with plaintiff's motion to compel. Pursuant to RCFC 37, plaintiff seeks an order compelling defendant to turn over a range of documents. These documents can be organized into five categories: (I) requests for legal advice from personnel in various Interior agencies to Interior's Office of the Solicitor (the Solicitor's Office), either directly or indirectly concerning Jicarilla's accounts; (ii) legal advice provided by the Solicitor's Office or other government legal offices, again either directly or indirectly concerning Jicarilla's accounts; (iii) documents created by or provided to the accounting firm of Arthur Andersen LLP under a series of contracts between that firm and Interior; (iv) documents generated by Interior personnel, including members of the Solicitor's Office, regarding pending or anticipated litigation involving other tribes; and (v) other miscellaneous documents or drafts (*e.g.*, cover sheets). Defendant contends that all or portions of these documents are protected by the attorney-client privilege, the work product doctrine or both. Plaintiff argues that the cited privileges are inapplicable to the wide majority of the documents requested and that, as to other documents, defendant has waived these privileges.

A.

Regarding the twin privileges raised by defendant, this court has recently explained:

> The symbiotic relationship between the attorney-client and work product privileges stems from shared pragmatic and systemic justifications and is reflected in principles common to both. Under Rule 501 of the Federal Rules of Evidence, both privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Both also stand in tension with the desire to avoid suppressing probative evidence and, for that reason, have been narrowly construed—extended only as far as needed to effectuate their utilitarian purposes. *See, e.g., Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990); *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *see generally Ullmann v. United States*, 350 U.S. 422, 438-40 (1956) (Frankfurter, J.) ("Once the reason for the privilege ceases, the privilege ceases."). . . . Lastly, parties claiming the benefit of either privilege bear the burden of establishing all the essential elements thereof, a burden that is not "discharged by mere conclusory or *ipse dixit* assertions." *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965).

Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 127 (2007) (alternate citations and footnotes omitted). "Yet while the attorney-client and work product privileges are similar and often invoked with respect to the same documents, they diverge in critical regards." *Id.* And, as it turns out, those differences ultimately

serve to inform the extent to which the privileges apply in the context of the fiduciary relationship involved here.

The attorney-client privilege "protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice." *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *see also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006); *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987). The privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).[4] The familiar Wigmorean definition of the privilege asserts that—

> [w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (McNaughton rev. 1961). "Breaking this definition into its component parts," this court recently observed, reveals that "'in order for the attorney-client

---

[4] *See also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); *Evergreen Trading*, 80 Fed. Cl. at 128.

privilege to attach, the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (3) to an attorney; and (4) in the context of an attorney-client relationship.'" *Evergreen Trading*, 80 Fed. Cl. at 128 (quoting *United States v. BDO Seidman LLP*, 492 F.3d 806, 815 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1471 (2008)); *see also United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Stovall*, 85 Fed. Cl. at 814.[5] "'[A]n agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege.'" *Rein v. United States Patent and Trademark Office*, 553 F.3d 353, 376 (4th Cir. 2009) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir.

---

[5] Although ultimately not adopted, the rule describing the attorney-client privilege promulgated by the Supreme Court in 1972 as part of the Proposed Federal Rules of Evidence has been recognized "as a source of general guidance regarding federal common law principles." *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2d Cir. 2005); *see also* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.02 (Joseph M. McLaughlin, ed., 2d ed. 2006). Proposed Rule 503 was particularly instructive in summarizing the types of communications that may be subject to the privilege—

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Proposed Fed. R. Evid. 503(b), 56 F.R.D. 183, 236 (1972); *see also BDO Seidman*, 492 F.3d at 814-15 (relying on this proposed rule).

1980)); *see also Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

While the attorney-client privilege has ancient Roman roots, the work product doctrine is a more recent creation, born sixty-two years ago in the Supreme Court's seminal decision in *Hickman*. There, Justice Murphy, writing on behalf of the majority, rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." 329 U.S. at 510. Noting that "it is essential that a lawyer work with a certain degree of privacy," he reasoned that if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten." *Id.* at 510-11. "An attorney's thoughts, heretofore inviolate, would not be his own," Justice Murphy stated, and continued—

> Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511.[6] The "strong public policy" underlying this doctrine has often been reaffirmed by the Supreme Court, *see, e.g., Upjohn Co.*, 449 U.S. at 398; *United*

---

[6] *See also In re Seagate Tech., LLC*, 497 F.3d 1360, 1374-75 (Fed. Cir. 2007); *EchoStar*, 448 F.3d at 1301 (work product doctrine "encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor"); *Genentech*, 122 F.3d at 1415.

States v. Nobles, 422 U.S. 225, 236-40 (1975), and has found a home in Federal Rule of Civil Procedure 26(b)(3). That rule states that documents "prepared in anticipation of litigation or for trial" are discoverable only upon a showing of "substantial need" for the materials and cannot, without "undue hardship," obtain the "substantial equivalent by other means." *See also* RCFC 26(b)(3) (including the identical language). Even where this showing has been made, however, the rule provides that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Id.*; *see also United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998).[7]

But, this rule leaves a few issues unresolved. In particular, it "does not in so many words address the temporal scope of the work product immunity," *Fed. Trade Comm'n v. Groiler, Inc.*, 462 U.S. 19, 25 (1983), that is to say, "it does not precisely define when the privilege attaches," *Evergreen Trading*, 80 Fed. Cl. at 132. Certain dimensions of this timing question are reasonably established. For example, it is well-recognized that for the rule to apply, litigation need not already have commenced or be imminent; rather, there must merely be a real possibility of litigation at the time the documents in

---

[7] In the words of the Federal Circuit, this rule "only allows discovery of 'factual' or 'non-opinion' work product and requires a court to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." *EchoStar*, 448 F.3d at 1302 (internal quotations omitted); *see also Seagate Tech.*, 497 F.3d at 1374-75 ("Whereas factual work product can be discovered solely upon a showing of substantial need and undue hardship, mental process work product is afforded even greater, nearly absolute, protection."); *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 93 (2007).

question are prepared. *See, e.g., Evergreen Trading*, 80 Fed. Cl. at 132; *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 445 (2007); *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481, 485 (2000); *see also Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987). Further, by way of guidance, the drafters of the rule stated that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided for by this subdivision." *See* Rule 26(b)(3) advisory comm. notes (1970); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000); *Evergreen Trading*, 80 Fed. Cl. at 132; *United States v. KPMG, LLP*, 237 F. Supp. 2d 35, 41 (D.D.C. 2002).

Yet, there is less agreement as to when litigation is "anticipated" for purposes of this rule. After carefully analyzing this issue, this court in *Evergreen Trading* adopted a simple causation test employed by no fewer than nine circuits, *to wit*, whether a given document was prepared or obtained "because of" the prospect for litigation. *Evergreen Trading*, 80 Fed. Cl. at 132-33.[8] As

---

[8] *See also United States v. Roxworthy*, 457 F. 3d 590, 599 (6th Cir. 2006); *In re Grand Jury Subpoena*, 357 F.3d 900, 907-08 (9th Cir. 2004); *Maine v. Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *Adlman*, 134 F.3d at 1202; *E.E.O.C. v. Lutheran Social Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999); *Martin v. Bally's Park Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), cert. denied, 484 U.S. 917 (1987); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983); Alan Wright, Arthur R. Miller & Richard L. Marcus (hereinafter "Wright, Miller & Marcus"), 8 Federal Practice & Procedure § 2024, at

the court noted, this test is preferable to other formulations as it closely tracks the language of the RCFC 26(b)(3), under which the doctrine is "triggered so long as anticipating litigation was one of the purposes for which the document was prepared." *Evergreen Trading*, 80 Fed. Cl. at 133. This approach allows courts to account more readily for "dual purpose" documents that, though generated in making business decisions, "reveal an attorney's litigating strategies and assessment of legal vulnerabilities—precisely the type of discovery that the Supreme Court refused to permit in *Hickman*." *Id.*; *see also Adlman*, 134 F.3d at 1202; *State of Maine*, 298 F.3d at 68-70; 8 Wright, Miller & Marcus, *supra* at § 2024. Nonetheless, the court in *Evergreen* noted that the work product doctrine would not cover documents that "'would have been generated in the normal course of business even if no litigation was anticipated.'" 80 Fed. Cl. at 133 n.16 (quoting *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002)); *see also Roxworthy*, 457 F.3d at 599 (work product doctrine does not attach if the documents "'would have been created in essentially similar form irrespective of the litigation'" (quoting *Adlman*, 134 F.3d at 1202)).

A final, but important, caveat about the work product doctrine bears mention—it is relatively well-established that the immunity from discovery provided by the doctrine extends into subsequent litigation. Thus, "[i]f information was created in anticipation of litigation with

---

343 (1994); *cf. In Re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000), cert. denied, 532 U.S. 919 (2001) (applying a test focusing on the "primary motivating purpose behind the creation of the document").

respect to Case A and otherwise meets all of the work product criteria, it remains immune from discovery in Case B." Douglas R. Richmond, "The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era," 110 Penn. St. L. Rev. 381, 394 (2005). While the Supreme Court has recognized this principle only in *obiter dicta*, *see Groiler*, 462 U.S. at 25 ("the literal language of [Rule 26(b)(3)] protects materials prepared for ***any*** litigation or trial as long as they were prepared by or for a party to the subsequent litigation" (emphasis in original)),[9] it appears, nonetheless, that every circuit to address this issue has reached the same conclusion, all the more so where there is some factual or legal nexus between the two cases involved. *See, e.g.*, *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002); *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 703 (10th Cir. 1998); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994). This court has likewise stated that "work product immunity applies to documents prepared in anticipation of unrelated terminated litigation." *Eagle-Picher Indus., Inc. v. United States*, 11 Cl. Ct. 452, 457 (1987). This rule makes eminent sense as applied to the government, which often handles clusters of cases involving the same issues—a perfect example being the dozens of tribal trust cases now pending before this court. To rule, in such circumstances, that work product from one case may be discovered in the next would be, as one court observed, "to elide the broad rationale of the Court's deci-

---

[9] The Federal Circuit has suggested that courts in this circuit are obliged to follow "explicit and carefully considered" *dicta* in Supreme Court opinions. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1350 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); *see also Ins. Co. of the West v. United States*, 243 F.3d 1367, 1372 (Fed. Cir. 2001).

sion" in *Hickman* and invite a game of discovery leapfrog. *Duplan Corp. v. Moulinage et Retorderie et Chavanoz*, 487 F.2d 480, 483-84 (4th Cir. 1973); *see also In re Murphy*, 560 F.2d 326, 334-35 (8th Cir. 1977) ("[t]he work product privilege would be attenuated if it were limited to documents that were prepared for the case for which discovery is sought"). That this court will not do.

B.

So how do these privileges function when the party seeking the documents is in a fiduciary relationship with the party invoking the privilege?

Although the Federal Circuit has not yet addressed this issue, a "fiduciary exception" to the attorney-client privilege is "well established in [the] federal jurisprudence" of many circuits. *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 624 (E.D. Mo. 2000). Under this exception, fiduciaries may not shield from their beneficiaries communications between them and their attorneys that relate to fiduciary matters, including the administration of trusts. *See Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002). Rather, communications between the fiduciary and its attorney may be protected only if they concern the personal interests of the fiduciary or other non-fiduciary matters. The justification for this exception is two-fold. First, courts have reasoned that the fiduciary is not the exclusive client of the attorney rendering advice, but rather is obtaining that advice either as a proxy for the beneficiaries or jointly therewith.[10]

---

[10] *See United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986) (per curiam); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 493 (M.D.N.C. 2008); *Cobell*, 212 F.R.D. at 27; *Washington-Baltimore*

These courts have concluded that it is inappropriate to prevent the beneficiary from obtaining information regarding the management of a trust provided to the fiduciary.[11] Indeed, so viewed, the exception really is no exception at all, but rather reflects the fact that "at least as to advice regarding . . . administration, a trustee is not the 'real client' and thus never enjoyed the privilege in the first place." *Mett*, 178 F.3d at 1063; *Evans*, 796 F.2d at 266. Other courts see the fiduciary exception more as deriving from the fiduciary's duty to keep the beneficiary informed of issues involving trust administration. *See Mett*, 178 F.3d at 1063; *Long Island Lighting*, 129 F.3d at 271-72; *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991). These courts hold that this duty overrides the attorney-client privilege, particularly where the information sought by the beneficiary is relevant to an alleged breach of a fiduciary duty. *Bland v. Fiatallis North Am., Inc.*, 401 F.3d 779, 787-88 (7th Cir. 2005); *Washington-Baltimore Newspaper Guild*, 543 F. Supp. at 909.[12]

Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982).

[11] *See, e.g., United Stats v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999); *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997); *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992) ("When an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator."); *Cobell*, 212 F.R.D. at 27; *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 607-08 (N.D. Cal. 2000).

[12] *See also* Restatement (Third) of The Law Governing Lawyers § 84 cmt. b (2000) ("In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communica-

Persuaded by at least one of these rationales, seven circuits (the Second, Fourth, Fifth, Sixth, Ninth, Eleventh and D.C.) have adopted some version of the "fiduciary exception" to the attorney-client privilege. *See Mett*, 178 F.3d at 1062 ("The Ninth Circuit . . . has joined a number of other courts in recognizing a 'fiduciary exception' to the attorney-client privilege."); *In re Lindsey*, 158 F.3d 1263, 1276 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998); *Long Island Lighting*, 129 F.3d at 272 ("[T]he ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan."); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1415-16 (11th Cir. 1994) (recognizing the exception, though declining to apply it on the facts presented); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 348 (4th Cir. 1992), *vacated on other*

---

tions with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties."); George G. Bogert, George T. Bogert & Amy M. Hess, The Law of Trusts and Trustees § 961 ("The beneficiary . . . has a right to obtain and review legal opinions given the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct."); 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 173 (4th ed. 1987) ("A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust"). Indeed, various cases have held that the privilege has little place where the substance of the advice is a primary focus of a lawsuit. *See United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991), *cert. denied*, 502 U.S. 813 (1991). Notably, Proposed Rule 503(d) would have created an exception to the attorney-client privilege thereunder "[a]s to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." Proposed Fed. R. Evid. 503(d)(5), 56 F.R.D. at 237.

grounds, 1993 WL 524680 (4th Cir. Apr. 7, 1993); *Wildbur*, 974 F.2d at 645 ("[A]n ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration."); *Fausek v. White*, 965 F.2d 126, 132-33 (6th Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992) (recognizing the exception). While many of these cases arise in the ERISA (Employee Retirement Income Security Act) context, that is not the only domain in which the exception functions, as defendant readily admits. Rather, it has been applied in a panoply of fiduciary settings, including cases involving shareholders, bank depositors and union members, to name but a few.[13] And, most importantly of course, it has been applied in tribal trust cases involving Interior and one or more tribes or other trust fund beneficiaries. *See Osage Nation and/or Tribe of Indians of Oklahoma v. United States*, 66 Fed. Cl. 244, 247-53 (2005); *Cobell*, 212 F.R.D. at 27-29; Order of May 16, 2002, in *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, Nos. 458-79 and 459-79 (copy attached).

---

[13] *See, e.g., Sandberg*, 979 F.2d 350-54 (shareholder derivative action); *Fausek*, 965 F.2d at 132-33 (applying the exception in a dispute between a corporation and its minority shareholders, and noting "[t]here is a mutuality of interests between a corporation and its shareholders that precludes use of the privilege by management to deprive shareholders of information relating to their investments in the corporation"); *Quintel Corp. v. Citibank*, 567 F. Supp. 1357, 1363 (S.D.N.Y. 1983) (bank and depositor); *Aquinaga v. John Morrell & Co.*, 112 F.R.D. 671, 679-81 (D. Kan. 1986) (union and union members); *see also In re Omnicom Group, Inc. Sec. Litig.*, 233 F.R.D. 400, 410 (S.D.N.Y. 2006) ("a trustee may not withhold from the beneficiary any communications by the trustee with an attorney that were triggered by the trustee's need for advice on how to carry out his fiduciary responsibilities").

The latter cases are particularly instructive for, in holding that the fiduciary exception applies in tribal trust cases, they discredit many of the apparently well-rehearsed arguments that defendant raises here. Thus, contrary to defendant's claims, these cases conclude that there is nothing about the fiduciary relationship between the United States and the tribes, or the statutes and treaties from which that relationship springs, that somehow renders the "fiduciary exception" inoperable. To the contrary, courts have recognized that the tribal trust duties, like the fiduciary duties arising in other federal statutory contexts, "draw much of their content from the common law of trusts." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). The result, as courts have confirmed repeatedly, is that basic trust principles are readily transferable to the Indian trust context.[14] Nor has defendant identified anything about its sovereign status that would limit its fiduciary responsibilities here, so as to contradict the duties upon which the fiduciary exception is moored, among them, the obligation to keep the beneficiaries well-informed. *See Osage*, 66 Fed. Cl. at 248 (finding "defendant's argument that the government's sovereign interests somehow negate or offset its

---

[14] The Supreme Court and other courts have emphasized that the standards governing private fiduciaries and their beneficiaries provide effective analogies in the tribal context. *See Nevada v. United States*, 463 U.S. 110, 127 (1983); *Mitchell*, 463 U.S. at 224; *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393, 1398-99 (8th Cir. 1987); *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 58 Fed. Cl. 542, 545 (2003); *Begay v. United States*, 16 Cl. Ct. 107, 127 n.17 (1987); *see also Wachtel v. Health Net, Inc.*, 482 F.3d 225, 233 (3d Cir. 2007). Indeed, to the extent that some of these cases deviate from this analogy, it is only to emphasize that the government has even greater duties. *Nevada*, 463 U.S. at 127; *Begay*, 16 Cl. Ct. at 127 n.17.

obligations as trustee to be unpersuasive"); *see also Cobell v. Norton*, 240 F.3d 1081, 1104 (D.C. Cir. 2001). That Interior is subject to Congressional oversight and specifically obliged by statute to make information available to the tribes hardly, as defendant intimates, belies the existence of a trust relationship—rather, if anything, it serves only to reaffirm it. *See Osage*, 66 Fed. Cl. at 250; *Cobell*, 213 F.R.D. at 11; *Shoshone Indian Tribe*, 58 Fed. Cl. at 545.[15] Finally, the aforementioned courts have made short shrift of defendant's contention that the "fiduciary exception" does not apply when the United States pays for legal advice out of its operating funds, rather than with trust funds. While the use of trust funds to pay for legal advice is an indication that the fiduciary exception may apply, the converse is not true—the absence of such an arrangement does not serve independently to negate the exception. *See* Restatement (Third) of Trusts § 182, cmt. f (noting that the current Restatement "diminishes the significance of who pays"). Rather, other factors may demonstrate the existence of the sort of fiduciary relationship upon which the fiduciary exception is founded. *See Osage*, 66 Fed. Cl. at 249; *Cobell*, 212 F.R.D. at 30.

---

[15] As noted in *Osage*, that some information regarding the administration of a tribal trust is available from other sources, does not relieve "the [g]overnment of *its* obligation, as a fiduciary, to provide complete and accurate information." *Osage*, 66 Fed. Cl. at 250 (emphasis in original); *see also Cobell*, 212 F.R.D. at 28. Indeed, to the extent that Congress has mandated the release of information, a reasonable argument can be made that it has waived the privilege as to other information involving the same subject matter. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1445 (2008); *Stovall*, 85 Fed. Cl. at 816.

That said, the court agrees with defendant that there is no corollary "fiduciary exception" to the work product doctrine. True, as plaintiff notes, several decisions have held that such an exception exists, operating on the rationale that a trustee's fiduciary obligations to keep the beneficiary informed trumps the doctrine. *See Osage*, 66 Fed. Cl. at 250-52; *Cobell v. Norton*, 213 F.R.D. 1, 13 (2003). But, the court is hesitant to view the exception in such cardinal terms, particularly where core work-product is involved, and especially given the Supreme Court's admonition that such product is entitled to "special protection." *Upjohn*, 449 U.S. at 400-01. In refusing to apply the fiduciary exception to work product, other cases have observed that the exception, as applied to the attorney-client privilege, is based upon a mutuality of interest between the fiduciary and the beneficiaries. They have logically opined that "once there is sufficient anticipation of litigation to trigger the work product immunity, . . . this mutuality is destroyed," making it unreasonable "to indulge in the fiction that counsel, hired by [the fiduciary], is also constructively hired by the same party counsel is expected to defendant against." *In re Int'l Sys. and Control Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982); *see also Tatum*, 247 F.R.D. at 501; *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 1994 WL 6883, at *4 n.3 (E.D. Pa. 1994); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 620 (S.D. Oh. 1983). On the strength of this sound rationale, the court agrees with the wide majority of courts that have held that the fiduciary exception does not apply to work product immunity.[16] Indeed, this

---

[16] *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 385 (3d Cir. 2007); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir.

result makes particular sense given that "the work product belongs to the litigator not the litigant fiduciary and it is the lawyer's impressions, strategies, and theories, the law is attempting to guard." *Lugosch*, 219 F.R.D. at 243; *see also Donovan v. Fitzsimmons*, 90 F.R.D. 583, 588 (N.D. Ill. 1981) ("[B]eneficiaries . . . do not stand in the same position with respect to the attorney, for whom the work-product rule is designed to benefit, as they do to their own trustees.").

The foregoing discussion begs several questions involving so-called mixed content documents—those in which both fiduciary and non-fiduciary matters are discussed, or in which the legal advice does not relate solely to the trustee's personal interests. Several courts have held that documents must be disclosed to the beneficiary unless the trustee shows that the document relates "solely" or "exclusively" to the trustee's nonfiduciary activities. *Osage*, 66 Fed. Cl. at 246-47; *Cobell*, 212 F.R.D. at 30; *see also Cobell v. Norton*, 377 F. Supp. 2d 4, 15 n.8 (D.D.C. 2005). But, there are several flaws with the notion that a document may be protected only if there is "not one drop" of information therein regarding trust administration. First, this exceedingly expansive view of the fiduciary exception and concomitantly cramped view of the privilege "threaten[s] to swallow the fiduciary's attorney-client privilege whole." *Mett*, 178 F.3d at 1065. As noted by the Ninth Circuit, under this expansive view of the exception, it would be the rare com-

---

1994); *Sandberg*, 979 F.2d at 355 n.22 (the fiduciary exception "does not apply to the work product doctrine"); *Lugosch v. Congel*, 219 F.R.D. 220, 243 (N.D.N.Y. 2003); *Struogo v. BEA Assocs.*, 199 F.R.D. 515, 524 (S.D.N.Y. 2001); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 687 W.D. Mich. 1996); *Helt Metro. Dist. Comm'n*, 113 F.R.D. 7, 11-12 (D. Conn. 1986).

munication that would be protected and, in turn, the rarer trustee who would feel any comfort in obtaining legal advice as to his personal liability. *Id.*; *Fischel*, 191 F.R.D. at 609. Second, this broad view of the exception far exceeds its rationale. When fiduciaries seek legal advice for themselves, it makes little sense to pretend that they are actually seeking advice on behalf of the beneficiaries and thus obliged to reveal to the beneficiaries the substance of that advice. *Mett*, 178 F.3d at 1065. To the contrary, when a fiduciary retains counsel and seeks legal advice for its own protection against the beneficiaries, any notion that it is seeking advice on behalf of the beneficiaries evaporates, leaving the beneficiaries with no reasonable expectation that they will be kept informed of such matters. *See Mett*, 178 F.3d at 1065, *Geissal*, 192 F.R.D. at 624-25. Finally, the expansive view of the exception seemingly treats the release of a document as an all-or-nothing proposition, ignoring the distinct possibility that a document containing both protected and unprotected information might be redacted to exclude the former, thereby allowing the privilege and exception to reign supreme within their respective spheres. Redactions allow a fiduciary to obtain personal legal advice with less fear that having a mere "drop" of information regarding its fiduciary obligations will cause an entire communication to be revealed. Yet, at the same time, this approach prevents fiduciaries from shielding everything as involving personal legal advice.

C.

Fully armed with these legal principles, we return to the documents themselves. As noted at the outset, the documents sought by plaintiff can be grouped into five

categories. The court will consider these groups *seriatim*.

1.

We begin with the documents in which various Interior officials requested legal advice from the Solicitor's Office (Docs. 38, 45, 48, 50, 52, 56, 61, 67, 71-73, 75, 88, 98, 105, 106, 150, 156, 160 and 188). The advice requested generally involves what are acceptable investments for the trusts or the proper procedures for making those investments, questions that, in turn, required the interpretation of various federal statutes, among them 25 U.S.C. § 160 and the Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132. There is little doubt that, as against discovery by ordinary third parties, these documents would be protected by the attorney-client privilege as they were "made . . . for the purpose of obtaining legal advice or services." *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000). This would be so even though the degree to which they reveal "client" information in seeking that advice varies. *See id.* at 806 ("[i]t is enough that the overall tenor of the document indicates that it is a request for legal advice or services"); *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 315 (2002); *cf. Stovall*, 85 Fed. Cl. at 818 ("bare-bone" request for representation that contains no client information not protected by attorney-client privilege).

Ultimately, however, it appears that all these documents involve matters regarding the administration of tribal trusts, either directly or indirectly implicating the investments that benefit Jicarilla. As such, in the court's view, they are subject to the fiduciary exception

to the attorney-client privilege and, on that basis, must be produced. *See Osage*, 66 Fed. Cl. at 252-53 (holding that the fiduciary exception applies to communications regarding trust administration "whether addressing specific tribes other than plaintiff's or Indians generally"). Six of the documents (Docs. 75, 88, 98, 150, 156 and 160), however, are exact duplicates of documents that are to be produced and the court, therefore, declines to order their production. *See Stovall*, 85 Fed. Cl. at 818 n.11; *Evergreen*, 80 Fed. Cl. at 137 n.23.

2.

Next, we consider various documents—by far, the largest group among our five—in which the Solicitor's Office (and other Federal legal offices) supplied legal advice to Interior and Treasury agency personnel (Docs. 9, 13-20, 26-31, 35-37, 39, 41-42, 44, 49, 51, 53-55, 60, 62-66, 69-70, 74, 76-82, 85-87, 89, 94-96, 100-04, 110, 112, 130-31, 151, 153-55, 157, 159, 167-68, 177-80, 182-87, 191-92, 202, 214-15, 217). These documents cover nearly a 75-year span, ranging from October 16, 1923, to April 10, 1996. They involve the legality or appropriateness of a variety of investments, investment strategies and other trust administration practices, again often by reference to specific statutes and regulations. Most of this information relates generally to trust administration. While only a handful of documents relate specifically to Jicarilla, all of them appear to be potentially relevant to plaintiff's claims regarding defendant's alleged breach of its fiduciary responsibilities in investing the trust corpus. In all but seven instances, defendant objects to the production of these documents based solely on the attorney-client privilege. With respect to documents 64,

76-77, 94, 112, 155 and 167, defendant also objects to production relying upon the work product doctrine.

As a threshold matter, there is some debate as to whether the legal advice provided by these government attorneys is protected under the attorney-client privilege. That privilege, of course, is primarily designed to protect client communications, not the resulting attorney advice. As this court recently noted, "[t]he question whether attorney communications are protected under the attorney-client privilege . . . has produced a spectrum of decisions." *Stovall*, 85 Fed. Cl. at 815. For its part, the Federal Circuit has suggested that the privilege ought to apply to "lawyer-to-client communications that reveal, directly or indirectly, the substance of a confidential communication by the client." *Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987); *see also Stovall*, 85 Fed. Cl. at 814-15.[17] Other circuits, however, have taken a broader view of the advice that is protected based upon perceived difficulties in sorting between advice based on representation and that which is not, while still other circuits have held that all advice provided by counsel to client is privileged. *See Stovall*, 85 Fed. Cl. at 814-15 (summarizing these cases). Depending upon which of these views prevails, a more or less compelling case can be made for protecting some or all of the advice at issue—certainly some of the advice in question reflects the substance of communications received from the personnel who had requested the legal advice. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir.

---

[17] *American Standard* is a patent case in which the Federal Circuit applied the law of the regional circuit, in that case the Seventh Circuit. *See In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1193 (1997).

1984); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977); *Stovall*, 85 Fed. Cl. at 815.

But, the court need not explore the outer reaches of this jurisprudence, as it finds that, with the exception of some duplicates,[18] virtually all the documents in question must be produced under the "fiduciary exception" to the attorney-client privilege. In arguing to the contrary, defendant asseverates that some of these documents do not discuss the legality of certain practices, but rather reflect "policy" decisions made by the agency in consultation with legal authorities. It is difficult to conceive how this point, if true, helps defendant much, for it would seem that, to the extent these documents are policy papers outside the fiduciary exception, they are also beyond the realm of the attorney-client privilege. They cannot be unrelated to the provision of legal advice for one purpose, but related for the other. *See* 8 Wright, Miller & Marcus, *supra*, at § 2017 ("The privilege will be denied if the communications were made for a purpose other than facilitating the rendition of professional legal services to the client."); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360-61 (2d Cir. 2005) (holding that legal advice that is incorporated into an agency's policy is not protected by the attorney-client privilege). Based on its *en camera* review, the court, in fact, believes that the advice provided in these documents is legal advice relating to trust administration

---

[18] The duplicate documents that need not be disclosed are documents 17-20, 26-27, 30-31, 78-79, 82, 85, 89, 95, 101-02, 130-31, 151, 153-54, 157, 159, 183, 185, 192, 214-15.

and, for that reason, must be disclosed under the "fiduciary exception."[19]

Again, there are a few exceptions. One is document 36, which was drafted by officials in the Solicitor's Office. It appears to be unrelated to general trust administration and thus seemingly has no relevance to the handling of Jicarilla's accounts. Rather, it incorporates legal advice with respect to several pending disputes. It thus is covered by the attorney-client privilege and not subject to the fiduciary exception.

The remaining documents in this set (28 and 29) present a bit of a quandary. In these documents (which are nearly, but not entirely, identical), the Solicitor's Office discusses the handling of "Indian moneys, process of labor" (IMPL) trust fund accounts—but does so while referring to several disputes regarding those funds. Defendant objects to the production of these documents on the basis of the attorney-client privilege. But, significant portions of the documents involve trust management issues and appear to be covered by the fiduciary exception. Accordingly, these portions of the documents seemingly are produceable. Those same portions, however, arguably are protected by the work product doctrine as the analysis in question appears to have been done in anticipation of litigation. Yet, in its several iter-

---

[19] As to five of these documents (13-14, 55, 76, and 180), it also appears that defendant waived any applicable privilege when copies of these documents were provided to plaintiff by one or more government employees or otherwise were publicly made available (*e.g.*, during Congressional hearings). *See Evergreen*, 80 Fed. Cl. at 133; *Jade Trading, LLC v. United States*, 80 Fed. Cl. 11, 44 n.65 (2007). Defendant mounted no defense to this waiver argument in its briefs and, on that basis, the court declined to hear oral argument from defendant on this point.

ative privilege logs, defendant never objected to the production of the documents on work product grounds.

Does that mean that any work product objection as to these documents was waived? The answer may be found in RCFC 26(b)(5)(A) which, like its Federal Rule counterpart, states:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed —and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Under this rule, one who fails expressly to invoke a privilege as to a particular document may lose that objection. *See SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476 (E.D. Pa. 2005); *Potter v. United States*, 2002 WL 31409613, at *8 (S.D. Cal. July 26, 2002). But, as the advisory committee notes to the analogous Federal Rule indicate, such a finding is in the nature of a sanction arising under RCFC 37. *See* Fed. R. Civ. P. 26(b)(5), advisory comm. notes (1993); *see also Clearvalue, Inc. v. Pearl River Polymers, Inc.*, 560 F.3d 1291, 1302 (Fed. Cir. 2009). Various cases hold that, in deciding whether to impose such a sanction, a court should weigh, *inter alia*, the intent of the party producing the defective log, the harm caused by disclosure of what might otherwise be privileged documents, and the prejudice, if any, experienced by the requesting party if

the sanction is not imposed.[20] At least in a case such as this—where the documents are accurately described in the log; where their production could reveal core work product; where plaintiff would have still filed its motion to compel, was able to argue the work product issue in the context of other documents, and would not be otherwise prejudiced; and where the application of the privilege is obvious from the face of the documents in question—treating defendant as having waived the work product doctrine would be inappropriate.[21] Accordingly, the court concludes that documents 28 and 29 are protected by the work product doctrine and need not be produced.

---

[20] *See also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for the District of Montana*, 408 F.3d 1142, 1149 (9th Cir. 2005), *cert. denied*, 546 U.S. 939 (2005) (indicating that in determining whether a privilege is waived courts should make a "case-by-case determination"); *Evergreen Trading*, 80 Fed. Cl. at 126 n.2 (listing some of the factors to be considered); *Universal City Development Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 695-96 (M.D. Fla. 2005) (applying a multi-factor approach in deciding whether the privilege is waived); *Cunningham v. Conn. Mut. Life Ins.*, 845 F. Supp. 1403, 1409 (S.D. Cal. 1994) (same); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (same); *see generally, RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 2003 WL 41996, at *3 (S.D.N.Y. Jan. 6, 2003) (reaching the same result based on a local rule). Another reason that cuts against treating a privilege as being waived under RCFC 26(b)(5) if not specifically asserted in an itemized privilege log is the fact that various courts have construed the comparable Federal Rule as not always requiring such logs. *See In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (allowing for categorical objections).

[21] This is not to suggest that the court would never be within its rights to decide the availability of a privilege based upon the log actually filed by a party. Here, however, the court (and the parties) have gone well beyond that point.

3.

In the third category of documents implicated by plaintiff's motion to compel are those documents created by or provided to the accounting firm of Arthur Andersen LLP under a series of contracts between that firm and Interior (Docs. 111, 142-48, 171-72, 203-09, 213). Defendant objects to the production of these documents under the work product doctrine. Under RCFC 26(b)(3) and the standards outlined above, it is important to determine when defendant first anticipated that litigation regarding the tribal trusts would arise and whether the documents in question were prepared because of the prospect of such litigation. As noted, if the documents are protected work product for other cases, they remain so in this litigation.

Beginning in the 1950s, and accelerating in the 1980s, cases were filed in various courts, including this one, alleging that Interior's Bureau of Indian Affairs (BIA) had mishandled various matters involving tribal trust fund accounts. *See, e.g., Navajo Tribe of Indians v. United States*, Complaint No. 49692 (file June 15, 1950); *Red Lake Band of Chippewa Indians v. United States*, Complaint No. 388-82L (filed August 6, 1982). Near the end of the 1980s, it appears that Arthur Andersen performed various work for the BIA, including financial and compliance audits of the BIA Office of Trust Funds Management for the fiscal years ending September 30, 1988, 1989 and 1990. Although this is unclear, the impetus for these audits may have been statutes Congress passed from 1987 to 1991 requiring audits

of tribal trust accounts.[22] On May 24, 1991, BIA and Arthur Andersen entered into a new contract "to assure that the accounting records and the accounting balances in the Tribal and Individual Indian Monies (IIM) accounts are reconciled as accurately as possible back to the earliest date practicable using available accounting records and transaction data." This contract anticipated the active involvement of the tribes in the reconciliation process and indicated that both the BIA and the relevant tribes would receive copies of the final reports and supporting documents.[23] This reconciliation process was apparently ongoing when, in 1994, Congress enacted the aforementioned Trust Fund Reform Act, requiring the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a); *see also Eastern Shawnee Tribe of Oklahoma v. United States*,

---

[22] *See* Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of Nov. 5, 1990, Pub, L. No. 101-512, 104 Stat. 1915; Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 701; Act of Sept. 27, 1988, Pub. L. No. 100-446, 102 Stat. 1774; Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329.

[23] Under the contract, Arthur Andersen was expected to conduct an entrance conference with the tribe to identify "outstanding accountability issues or concerns related to the Tribe's accounts." Following the completion of the reconciliation work, it was also expected to conduct an exit conference with the tribe "to review any proposed adjusting entries relating to the Tribe's accounts," at which conference "[s]upporting documentation related to the adjustments will be made available to the Tribes." The contract also required that each trust account owner "be presented with a copy of the reconciled statements, a summary of any required adjusting entries relating to their account(s), and access to any supporting documentation related to those adjustments."

82 Fed. Cl. 322, 324 (2008). This statute also required the tribes to either accept or dispute the reconciled account balances, with that information to be included in a report to Congress from the Secretary of the Interior by May 31, 1996. 25 U.S.C. § 4044. On December 31, 1995, Arthur Andersen completed its reconciliation of tribal trust funds for the period July 1, 1972, through September 30, 1992, and, at or around that time, delivered reports and account statements to both the BIA and the tribal account owners. In a modification of the 1991 contract, dated March 5, 1996, BIA engaged Arthur Andersen to assist it in entering into "settlement discussions" with the tribes.

On June 10, 1996, the complaint was filed in *Cobell v. Babbit*, No. 96-1285, a class action involving approximately 300,000 Native American account holders. Two months later, on August 19, 1996, BIA entered into yet another contract with Arthur Andersen, under which the latter was to provide to BIA and the Indian account owners access to, as well as a presentation and interpretation of, the work performed under the 1991 contract, as amended. As indication of the growing disputes between BIA and the tribes, the Statement of Work for this contract cautions that "[t]he Department of Interior is expecting to develop a settlement mechanism, which may include proposing legislation, to settle with tribes concerning their trust account balances," adding that the reaching of such a settlement may require explanation or interpretation of Arthur Andersen's prior work. The contract provided that before any information was supplied to a tribe, the contracting office representative or his designee "may review the specific work papers a tribe requests to be copied." It further noted that "[a]ll communications between the Government and [Arthur

Andersen], as well as any materials or information developed or received by [Arthur Andersen] under this contract may be protected by applicable legal privileges and therefore must be treated as confidential by [Arthur Andersen]."

Most of the documents in this third category relate to the litigation referenced above and include communications between either the Solicitor's Office or the Department of Justice and Arthur Andersen that specifically discuss particular cases. These documents (148, 171, 172, 203-09 and 213) plainly are protected by the work product doctrine, which, for the reasons discussed above, applies even though these documents do not specifically reference Jicarilla or any matters involved with this litigation. This is true even though some of these documents were prepared by Arthur Andersen, as RCFC 26(b)(3) extends the work product protection to materials prepared "by or for [the] party's representative."[24] Nor has plaintiff remotely made any showing that would override the work product doctrine.

Several documents in this set, however, are different. Included within document 111 is a research paper that

---

[24] In *Nobles*, the Supreme Court emphasized that the work product doctrine does not merely protect an attorney's thought processes because—

> attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

422 U.S. at 238-39; *see also In Re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004) (applying the doctrine to materials prepared by an investigator working for attorneys); *Evergreen*, 80 Fed. Cl. at 142 (applying the doctrine to materials produced by an accountant).

was forwarded to the National Archives in 1993, to which are attached a series of historical documents. While the first page of this document is work product, the remainder (from M50IRN341924 to M50IRN342083) is not, particularly since a hand-written notation on the paper indicates that it is "publicly-available" at the Archives. Accordingly, the indicated pages of document 111 shall be produced. The court also finds that documents 142-47, which are summary tables of reconciled disbursements for tribes, dated August 4, 1996, appear to stem from Arthur Andersen's reconciliation work under the 1991 contract, were not prepared in anticipation of litigation, and thus must also be produced.

4.

We consider next the fourth category of documents—those generated by Interior personnel, including members of the Solicitor's Office, regarding litigation involving other tribes (Docs. 32-34, 40, 43, 46-47, 58, 68, 83-84, 99, 107, 113-14, 120, 125-26, 158, 181, 189-90, 212, 216, 219). As is true with many of the Arthur Andersen documents, all but two of these documents discuss specific legal issues involving either pending or anticipated cases, including the *Cobell* litigation. Because these documents were prepared in anticipation of litigation, they are protected under the work product doctrine; and plaintiff has made no showing of "substantial need" or "undue hardship" as would override the work product doctrine under RCFC 26(b)(3). Indeed, as the substance therein does not involve trust management, they fall outside the "fiduciary exception" and are protected by the attorney-client privilege, as well.

Four documents in this set (Docs. 68, 189-90, and 212), however, stand on a different footing. They were drafted by the Solicitor's Office and recommend that particular strategies for investing tribal trust funds be adopted in response to litigation. Document 68 discusses the investment of trust funds while making a brief footnote reference to pending litigation. In the court's view, except for the footnote, this document is not protected by the work product doctrine as it would have been generated even if future litigation was not anticipated. And to the extent covered by the attorney-client privilege, this material is subject to the fiduciary exception thereto. The court will order the production of this document with footnote 1 redacted. Documents 189, 190 and 212 (which are similar, but not identical) describe the impact on trust administration of the Supreme Court's decision in *Mitchell*. Defendant claims that these memoranda are protected by the attorney-client privilege, but, in the court's view, these documents are indistinguishable from the other documents regarding trust administration ordered to be produced under the fiduciary exception. Hence, documents 189, 190 and 212 shall be produced, as well.[25]

5.

The last category of documents to be considered is admittedly a catch-all capturing things that do not readily fit into any of the other categories (Docs. 97, 109, 115-19, 173, 176). Two of these documents involve either a request for, or the provision of, legal advice—109 (an electronic message requesting clarification of a prior

---

[25] For the reasons previously described, defendant need not produce documents 99 and 158, which are essentially duplicates of document 68, or document 216 which is an exact duplicate of document 190.

conversation) and 116 (suggested edits to a draft letter to tribal leaders regarding the Arthur Andersen reconciliation reports)—and thus seemingly are protected under the attorney-client privilege. Document 116, however, also appears to fall within the fiduciary exception, as it relates to trust management and thus must be disclosed. Likewise, document 97, which describes a draft bill on tribal trust funds, also is subject to the fiduciary exception and must be produced. Three of the other documents in this set (115, 118 and 173) are cover sheets that reference associated materials, but, in fact, are not accompanied by attachments. Without the attachments and any other explanation from defendant as to the significance of these documents, the court believes that the cover sheets are protected neither by the attorney-client privilege nor the work product doctrine. They too must be produced. Finally, document 176, which is a letter recommending that a suit be initiated to collect on a promissory note, appears to be work product and thus need not be disclosed.[26]

* * * * *

This completes the court's consideration of plaintiff's motion to compel, with the results again summarized in the accompanying Appendix A.

III.

Not coincidentally, plaintiff's motion for a protective order and defendant's motion to compel both involve the same subject matter: requests for information (to be ob-

---

[26] For the reasons previously described, defendant need not produce documents 117 and 119, which are essentially duplicates of document 116.

tained through various means) concerning how Jicarilla managed and invested its own funds, *i.e.*, its non-trust investments.[27] The main bone of contention here is whether, under RCFC 26(b), the requested discovery "is relevant to the subject matter involved in the action." Consistent with the goal of promoting the "just and complete resolution of disputes," the Federal Circuit has stated, "[r]elevancy for purposes of Rule 26 is broadly construed." *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993); *see also Centurion Indus., Inc. v. Warren Steurer and Assocs.*, 665 F.2d 323, 326 (10th Cir. 1981); *Evergreen Trading*, 80 Fed. Cl. at 144. That said, "[t]he rule has boundaries," for "[d]iscovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is outside its scope." *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 742 (Fed. Cir. 1987) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978)).

Defendant argues that its discovery requests are for relevant information or at least are reasonably calculated to lead to the discovery of admissible evidence. It asserts that the information requested is relevant in assessing: (i) the reasonableness of the government's handling of Jicarilla's trust accounts; (ii) the tribe's liquidity needs over the period in question; (iii) the receipt and timing of trust fund disbursements; and (iv) the damages to which plaintiff may be owed. Plaintiff and *amici* argue that Jicarilla's handling of its non-trust funds is wholly irrelevant to this suit, in which the focal

---

[27] RCFC 26(c)(1) provides that, "for good cause," the court may issue an order to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense," including provisions "forbidding the disclosure or discovery." *See also Vons*, 51 Fed. Cl. at 4.

point is whether defendant mismanaged plaintiff's trust funds. They note that defendant has not cited any authority in which evidence of the sort it seeks was considered relevant in resolving the issues defendant cites. Plaintiff and the *amici* assert that defendant's silence in this regard speaks volumes. And, to the court's ears, it most certainly does.

Given the volume of tribal trust litigation over the last thirty years, one would expect that, if defendant were right, there would be at least one confirming case in which evidence of a tribe's non-trust investment patterns was deemed relevant in determining whether the government had breached its fiduciary duties in mishandling tribal trust accounts. Or at least there would be some untried theory of liability under which such evidence might conceivably be relevant. But, defendant offers nothing of the sort—nothing. And, research, far from yielding that which defendant has omitted, instead sheds light on why no such authorities are encountered —it is because, as anyone familiar with a spendthrift trust knows, fiduciaries and beneficiaries are simply not judged by the same investment standards. Rather, fiduciaries are governed by standards that require them to exercise more skill and care than ordinary individuals are expected to exercise in handling their own private investments. This view is reflected in many cases involving the alleged misappropriation or mismanagement of tribal trusts, in which it is often observed that the duty of care owed by the United States "is not mere reasonableness, but the highest fiduciary standards." *Am. Indians Residing on the Maricopa-Ak Chin Reserva-*

tion v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981).[28] That view, as it turns out, has been a prominent feature of the trust law landscape for the last 180 years, from the time the "prudent man rule" was announced by Judge Putnam in *Harvard College v. Amony*, 26 Mass (9 Pick.) 446, 461 (1830), through the most recent edition of the Restatement on Trusts.[29] Accordingly, without prejudging the precise standards that will ultimately govern liability in this case, every current indication is that defendant's liability here does not depend in any way on how Jicarilla invested its own funds. As such, the court finds that the wide majority of the information sought by defendant does not meet the relevancy requirement in RCFC 26(b) and that plaintiff, therefore, is entitled essentially to the protective order that it seeks. The court will not allow defendant to throw out a broad net on the mere hope of catching relevant evidence. *See Vons Cos, Inc.*, 51 Fed. Cl. at 24-25 ("While . . . some degree of fishing is anticipated by the Federal discovery rules, those rules do not sanction a party to employ es-

---

[28] *See also United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Shoshone Indian Tribe*, 364 F.3d at 1348; *Short v. United States*, 50 F.3d 994, 999 (Fed. Cir. 1995); *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 163 (Ct. Cl. 1980); *Red Lake Band*, 17 Cl. Ct. at 373.

[29] While the Restatement (Third) on Trusts § 90 has abandoned the "prudent man" standard in favor of the gender neutral "prudent investor," it continues to emphasize that an adaptable part of that standard requires "fiduciaries possessing special facilities and skills to make those advantages available to the trust and its beneficiaries." *Id.* at cmt. d; *see also id.* ("it follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill.").

sentially a purse seine that indiscriminately sweeps in not only relevant catch, but hosts of irrelevant and protected species of information.").

In a last ditch effort to avoid this result, defendant, at oral argument, cited deposition testimony that it claimed showed that BIA employees were making trust decisions based on Jicarilla's non-trust investments. The court ordered defendant to file that deposition testimony. A review of that document does not bear out defendant's claim.

The testimony in question is that of Mr. Gabriel Abeyta, who served as Jicarilla's chief accountant from 1958 to 1970, and as BIA's tribal assistance officer for Jicarilla from 1970 to 1986. Mr. Abeyta's deposition, to be sure, demonstrates that he knew about plaintiff's non-trust investments, information he no doubt gleaned during his dozen or so years as the tribe's top accountant. As part of his later job at BIA, Mr. Abeyta continued to advise Jicarilla regarding its outside investments. But there is no indication that the information Mr. Abeyta possessed regarding Jicarilla's non-trust assets ever was factored into the BIA's investment decisions regarding tribal trust funds. And it is doubtful that could have ever occurred given the limitations that 25 U.S.C. §§ 161(a) and 162(a) impose on the types of investments BIA could make with the tribal trust funds. Mr. Abeyta's testimony, in fact, highlights the latter point in explaining why the tribe invested in real estate and a film project in an effort to diversify its overall investments. Yet there is no indication that the reverse was true—that the BIA calibrated its investments to take into account Jicarilla's non-trust ventures. Contrary to defendant's claim, then, nothing in Mr. Abeyta's

deposition testimony suggests in the least that any information relevant to this case could be deduced by comparing Jicarilla's outside investments to BIA's investments of the trust funds.

Defendant likewise has provided virtually nothing to back up its claim that Jicarilla's investment records are needed to assess the tribe's periodic liquidity needs, the receipt and timing of trust fund disbursements and the damages plaintiff may be owed. The court is unwilling to order the production of what apparently are extensive records based upon such shallow and unsupported assertions, particularly given the thousands of documents that defendant might have mustered to back up its relevancy claims. *See United States v. Monumental Life Ins. Co.*, 440 F.3d 729, 736 (6th Cir. 2006) ("the 'mere assertion of relevance' . . . will not necessarily satisfy the government's burden" in seeking documents, especially where the request seeks a "voluminous amount of . . . proprietary information.").[30] Nevertheless, as discussed with the parties at oral argument, the court believes that Jicarilla's account information might be relevant to the limited extent that there are questions regarding whether and when trust disbursements were made. Therefore, the order that follows will permit defendant to seek leave of court to file a revised discovery request for basic account information relating to the Jicarilla accounts into which disbursements from the trust funds would have ordinarily flowed. It is expected that this request, if it is made at all, will be narrowly

---

[30] Indeed, defendant never has explained why, if this information was so vital to the BIA's investment decisions, the agency never had it in the first place.

tailored and should not be viewed as an opportunity to reargue points rejected herein.

IV.

The court need go no further. Based on the foregoing, and as reflected in the attached Appendix A, the court orders as follows:

1. Plaintiff's motion to compel is **GRANTED**, in part, and **DENIED**, in part:

   a. On or before July 13, 2009, the following documents shall be produced by defendant to plaintiff: **9, 13-16, 35, 37-39, 41-42, 44-45, 48-56, 60-67, 68 (sans footnote 1), 69-74, 76-77, 80-81, 86-87, 94, 96-97, 100, 103-06, 110, 111 (from M50IRN341924 to M50IRN342083), 112, 115-16, 118, 142-47, 155, 167-68, 173, 177-80, 182, 184, 186-91, 202, 212, and 217.**

   b. The following documents shall not be produced: **17-20, 26-34, 36, 40, 43, 46-47, 58, 75, 78-79, 82-85, 88-89, 95, 98-99, 101-02, 107, 109, 113-14, 117, 119-20, 125-26, 130-31, 148, 150-51, 153-54, 156-60, 171-72, 176, 181, 183, 185, 192, 203-09, 213-16, and 219.**

2. Plaintiff's motion for a protective order is **GRANTED, in part**, and **DENIED, in part** and defendant's motion to compel is **DENIED**; as described above, defendant may seek leave from the court to refile more limited discovery requests regarding plaintiff's outside investment records, with the timing of such motion to be established in the court's revised discovery plan;

3. Because neither party has fully prevailed herein, the court will not order the payment of reasonable expenses, *see* RCFC 37(a)(5); and

4. In lieu of granting defendant's motion to revise the discovery plan herein, on or before July 15, 2009, the parties shall file a joint status report indicating how this case should proceed, with a proposed schedule, as appropriate.[31]

IT IS SO ORDERED.

/s/ FRANCIS M. ALLEGA
FRANCIS M. ALLEGA
Judge

---

[31] It is the court's intention to unseal and publish this opinion after July 13, 2009. On or before July 13, 2009, each party shall file proposed redactions to this opinion, with specific reasons therefore.

Appendix A

III.C.1 Requests for Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
38	03.06.72	Commissioner to Assoc. Solicitor	Tribal trust fund investment in securities	A-C	Produce	Fiduciary exception
45	03.05.82	Asst. Secretary to Assoc. Solicitor	Handling of IMPL funds	A-C	Produce	Fiduciary exception
48	10.03.72	Commissioner to Assoc. Solicitor	Separating restricted and unrestricted accounts	A-C	Produce	Fiduciary exception
50	10.03.72	Commissioner to Assoc. Solicitor	Separating restricted and unrestricted accounts	A-C	Produce	Fiduciary exception
52	04.29.75	Trust Responsibilities to Assoc. Solicitor	Trust funds in IIM accounts	A-C	Produce	Fiduciary exception
56	Undated	Asst. Secretary to Assoc. Solicitor	Forwarding memoranda on Treasury securities, IIM account categorizing, and irrigation and power funds	A-C	Produce	Fiduciary exception
61	10.13.89	Deputy Asst. Sec'y to Assoc. Solicitor	Repurchase agreement investment	A-C	Produce	Fiduciary exception
67	10.19.71	Commissioner to Assoc. Solicitor	Tribal trust fund investment in securities	A-C	Produce	Fiduciary exception
71	10.19.71	Commissioner to Assoc. Solicitor	Tribal trust fund investment in securities	A-C	Produce	Fiduciary exception
72	10.27.72	Asst. Secretary to Assoc. Solicitor	Effect of 25 U.S.C. § 160 on ISSDA funds	A-C	Produce	Fiduciary exception

III.C.1 Requests for Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
73	03.06.72	Commissioner to Assoc. Solicitor	Tribal trust fund investment in securities	A-C	Produce	Fiduciary exception
75	04.29.75	Trust Responsibilities to Assoc. Solicitor	Trust funds in IIM accounts	A-C	Withhold	Duplicate of #52
88	10.03.72	Commissioner to Assoc. Solicitor	Separating restricted and unrestricted accounts	A-C	Withhold	Duplicate of #50
98	03.06.72	Commissioner to Assoc. Solicitor	Tribal trust fund investment in securities	A-C	Withhold	Duplicate of #38
105	xx.xx.77	Trust Services to Assoc. Solicitor	Setting rates on special deposits and IIMs	A-C	Produce	Fiduciary exception
106	04.14.80	Trust Responsibilities to Solicitor	CDs of $100,000 or more	A-C	Produce	Fiduciary exception
150	10.03.72	Commissioner to Assoc. Solicitor	Separating restricted and unrestricted accounts	A-C	Withhold	Duplicate of #50
156	03.06.72	Commissioner to Assoc. Solicitor	Tribal trust fund investment in securities	A-C	Withhold	Duplicate of #38
160	xx.xx.77	Trust Services to Assoc. Solicitor	Setting rates on special deposits and IIMs	A-C	Withhold	Duplicate of #105
188	05.01.79	Commissioner to Assoc. Solicitor	Using IMPL funds under 25 CFR 271.2	A-C	Produce	Fiduciary exception

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
9	05.13.85	Asst. Reg. Solic. to Asst. Area Dir.	Exemption of certain trust income under IRS code	A-C	Produce	Fiduciary exception
13	01.24.78 02.10.86	Assoc. Solic. to Asst. Sec'y or Deputy	Pooling of tribal trust funds	A-C	Produce	Fiduciary exception; waiver
14	01.24.78	Assoc. Solicitor to Deputy Asst. Sec'y	Pooling of tribal trust funds	A-C	Produce	Fiduciary exception; waiver
15	01.24.78 02.10.86	Assoc. Solic. to Asst. Sec'y or Deputy	Pooling of tribal trust funds	A-C	Produce	Fiduciary exception
16	02.10.86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Produce	Fiduciary exception
17	02.10.86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #16
18	02.10.86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #16
19	02.10.86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #16
20	02.10.86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #16
26	01.24.78	Assoc. Solicitor to Deputy Asst. Sec'y	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #14
27	01.24.78	Assoc. Solicitor to Deputy Asst. Sec'y	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #14
28	06.29.82	Assoc. Solicitor to Deputy Asst. Sec'y	Handling of IMPL funds	A-C	Withhold	Work product

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
29	06.29.82	Assoc. Solicitor to Deputy Asst. Sec'y	Handling of IMPL funds	A-C	Withhold	Work product
30	06.29.82	Assoc. Solicitor to Deputy Asst. Sec'y	Handling of IMPL funds	A-C	Withhold	Duplicate of #28
31	06.29.82	Assoc. Solicitor to Deputy Asst. Sec'y	Handling of IMPL funds	A-C	Withhold	Duplicate of #28
35	04.10.96	Deputy Solicitor to Special Trustee	Indian preference statute's application to Office of Trust Fund Management	A-C	Produce	Fiduciary exception
36	04.10.85	Regional Solicitor to Area Director	Erroneous payment collection on Phillips estate	A-C	Withhold	Privileged; not under fiduciary exception
37	11.23.82	Regional Solicitor to Asst. Area Dir.	Power of tribal courts to control IIM accounts	A-C	Produce	Fiduciary exception
39	07.17.72	Assoc. Solicitor to Commissioner	Tribal trust fund investment in securities	A-C	Produce	Fiduciary exception
41	10.16.23	Solicitor to Secretary	Investing tribal trust funds in water bond purchases	A-C	Produce	Fiduciary exception
42	11.20.72	Solicitor to Asst. Secretary	Reclassification of trust fund deposits in Treasury	A-C	Produce	Fiduciary exception
44	03.21.90	Assoc. Solicitor to Asst. Secretary	Contracting tribal trust funds to tribal organizations	A-C	Produce	Fiduciary exception
49	04.19.73	Asst. Solicitor to Investments	Separating unrestricted and restricted accounts	A-C	Produce	Fiduciary exception
51	04.19.73	Asst. Solicitor to Investments	Separating unrestricted and restricted accounts	A-C	Produce	Fiduciary exception
53	11.20.72	Solicitor to Asst. Secretary	Reclassification of trust fund deposits in Treasury	A-C	Produce	Fiduciary exception

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
54	10.10.73	Assoc. Solicitor to Asst. Secretary	Irrigation and power project investment under 25 U.S.C. § 162	A-C	Produce	Fiduciary exception
55	01.31.73	Area Director to Superintendents	Scope of 25 U.S.C. § 162a	A-C	Produce	Fiduciary exception; waiver
60	11.21.90	Asst. Solicitor to Trust Fund Mgmt.	Eligibility of Krupp, Inc. for trust fund investment	A-C	Produce	Fiduciary exception
62	04.21.88	Assoc. Solicitor to Asst. Secretary	Federal Advisory Committee Act	A-C	Produce	Fiduciary exception
63	10.07.66	Asst. AG (OLC) to Treasury Counsel	Investing in federal land bank obligations / banks for cooperatives	A-C	Produce	Fiduciary exception
64	10.22.66	Treasury Counsel to Treasury Secretary	Tribal trust fund investment in securities	A-C W-P	Produce	Fiduciary exception
65	05.03.68	Assoc. Solicitor to Commissioner	Tribal trust fund investment	A-C	Produce	Fiduciary exception
66	01.10.67	Asst. Solicitor to Commissioner	Treasury Circular 176 and tribal trust fund investment	A-C	Produce	Fiduciary exception
69	12.30.69	Acting Asst. Comm'r to Financial Mgmt.	Repurchase agreements	A-C	Produce	Fiduciary exception
70	04.08.66	Assoc. Solicitor to Asst. Secretary	Coeur d'Alene and Kalispel judgment fund investment	A-C	Produce	Fiduciary exception
74	02.07.72	Assoc. Solicitor to Commissioner	Tribal investment in bank time CDs	A-C	Produce	Fiduciary exception

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
76	Undated	Assoc. Solicitor to Deputy Asst Sec'y	BIA tribal trust fund investment	A-C W-P	Produce	Fiduciary exception; waiver
77	02.13.90	Assoc. Solicitor to Deputy Asst. Sec'y	Trust fund loss liability and reimbursement methods	A-C W-P	Produce	Fiduciary exception
78	11.20.72	Solicitor to Asst. Secretary	Reclassification of trust fund deposits in Treasury	A-C	Withhold	Duplicate of #42
79	Undated	Assoc. Solicitor to Deputy Asst. Sec'y	BIA tribal trust fund investment	A-C	Withhold	Duplicate of #76
80	12.15.88	Trust Accounting to Area Dirs. / Supers.	Relaying advice on *Keechi* litigation and IIM duties	A-C	Produce	Fiduciary exception
81	04.10.96	Deputy Solicitor to Special Trustee	Indian preference statute's application to Office of Trust Fund Management	A-C	Produce	Fiduciary exception
82	05.13.85	Asst. Regional Solic. to Asst Area Director	Exemption of certain trust income under IRS code	A-C	Withhold	Duplicate of #9
85	02.10.86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #16
86	04.26.76	Asst. Solicitor to Trust Responsibilities	Collateral pledged to secure non-trust tribal funds	A-C	Produce	Fiduciary exception
87	05.24.89	Assoc. Solicitor to Asst. Secretary	Tribal fund investment in unlisted agency securities	A-C	Produce	Fiduciary exception
89	04.19.73	Asst. Solicitor to Investments	Separating unrestricted and restricted accounts	A-C	Withhold	Duplicate of #49

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
94	06.27.73	Acting Assoc. Solicitor to Solicitor	Enumerating Secretary's tribal trust responsibilities	A-C W-P	Produce	Fiduciary exception
95	04.19.73	Asst. Solicitor to Investments	Separating unrestricted and restricted accounts	A-C	Withhold	Duplicate of #49
96	03.21.90	Assoc. Solicitor to Asst. Secretary	Contracting tribal trust funds to tribal organizations	A-C	Produce	Fiduciary exception
100	05.03.68	Assoc. Solicitor to Commissioner	Tribal trust fund investment	A-C	Produce	Fiduciary exception
101	04.08.66	Assoc. Solicitor to Asst. Secretary	Coeur d'Alene and Kalispel judgment fund investment	A-C	Withhold	Duplicate of #70
102	04.08.66	Assoc. Solicitor to Asst. Secretary	Coeur d'Alene and Kalispel judgment fund investment	A-C	Withhold	Duplicate of #70
103	10.30.72	Solicitor to Asst. Secretary	Reclassification of trust fund deposits in Treasury	A-C	Produce	Fiduciary exception
104	11.01.72	Solicitor to Asst. Secretary	Reclassification of trust fund deposits in Treasury	A-C	Produce	Fiduciary exception
110	06.01.92	Field Solicitor to Area Director	Non-trust tribal funds	A-C	Produce	Fiduciary exception
112	10.29.86	Field Solicitor to Area Director	Application of 31 U.S.C. § 3527 to IIM accounts	A-C W-P	Produce	Fiduciary exception
130	04.26.76	Asst. Solicitor to Trust Responsibilities	Collateral pledged to secure non-trust tribal funds	A-C	Withhold	Duplicate of #86

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
131	05.24.89	Assoc. Solicitor to Asst. Secretary	Tribal fund investment in unlisted agency securities	A-C	Withhold	Duplicate of #87
151	04.19.73	Asst. Solicitor to Investments	Separating unrestricted and restricted accounts	A-C	Withhold	Duplicate of #49
153	Undated	Assoc. Solicitor to Deputy Asst. Sec'y	BIA tribal trust fund investment	A-C	Withhold	Duplicate of #76
154	Undated	Assoc. Solicitor to Deputy Asst. Sec'y	BIA tribal trust fund investment	A-C	Withhold	Duplicate of #76
155	06.27.73	Acting Assoc. Solicitor to Solicitor	Enumerating Secretary's tribal trust responsibilities	A-C W-P	Produce	Fiduciary exception
157	07.17.72	Assoc. Solicitor to Commissioner	Tribal trust fund investment in securities	A-C	Withhold	Duplicate of #39
159	10.30.72	Solicitor to Asst. Secretary	Reclassification of trust fund deposits in Treasury	A-C	Withhold	Duplicate of #103
167	10.29.86	Field Solicitor to Area Director	Application of 31 U.S.C. § 3527 to IIM accounts	A-C W-P	Produce	Fiduciary exception
168	05.13.85	Assoc. Solicitor to Deputy Asst. Sec'y	Using outside vendors for trust fund management	A-C	Produce	Fiduciary exception
177	04.10.96	Deputy Solicitor to Special Trustee	Indian preference statute's application to Office of Trust Fund Management	A-C	Produce	Fiduciary exception
178	01.16.84	Assoc. Solicitor to Trust Responsibilities	Investing trust funds in savings and loan certificates	A-C	Produce	Fiduciary exception

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
179	01 07 81	Field Solicitor to Assoc. Solicitor	Classification of trust funds under Monetary Control Act	A-C	Produce	Fiduciary exception
180	Undated	Assoc. Solicitor to Deputy Asst. Sec'y	BIA tribal trust fund investment	A-C	Produce	Fiduciary exception, waiver
182	08 16 82	Assoc. Solicitor to Deputy Asst. Sec'y	Transfer of IMPL account funds	A-C	Produce	Fiduciary exception
183	08 16 82	Assoc. Solicitor to Deputy Asst. Sec'y	Transfer of IMPL account funds	A-C	Withhold	Duplicate of #182
184	10 xx 76	Acting Assoc. Solic to Commissioner	Effect of Public Law 93-638 on IMPL accounts	A-C	Produce	Fiduciary exception
185	08 16 82	Assoc. Solicitor to Deputy Asst. Sec'y	Transfer of IMPL account funds	A-C	Withhold	Duplicate of #182
186	06 17 76	Asst. Solicitor to Commissioner	IMPL fund request under Public Law 93-638	A-C	Produce	Fiduciary exception
187	06 09 80	Acting Assoc. Solic to Asst. Director	Draft regulations for 25 CFR 103	A-C	Produce	Fiduciary exception
191	05 13 85	Assoc. Solicitor to Deputy Asst. Sec'y	Using outside vendors for trust fund management	A-C	Produce	Fiduciary exception
192	01 24 78	Assoc. Solicitor to Deputy Asst. Sec'y	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #14
202	Undated	Assoc. Solicitor to Asst. Secretary	BIA's authority to put disbursing functions with eligible institution	A-C	Produce	Fiduciary exception
214	02 10 86	Assoc. Solicitor to Asst. Secretary	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #16

III.C.2 Provision of Legal Advice						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
215	01.24.78	Assoc. Solicitor to Deputy Asst. Sec'y	Pooling of tribal trust funds	A-C	Withhold	Duplicate of #14
217	09.30.66	Attorney General to Treasury Secretary	FNMA guarantees under FNMA Charter Act	A-C	Produce	Fiduciary exception

III.C.3 Arthur Anderson Documents						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
111	10.04.96	DOJ attorney to Arthur Anderson	Proposing legal strategy and forwarding Archives essay on GAO IIM audits	W-P	Withhold 1st page; produce remainder	Pg 1 is work product (M501RN341923); remainder is not
142	08.05.96		Reconciled disbursement summary	W-P	Produce	Not work product
143	08.05.96		Reconciled disbursement summary	W-P	Produce	Not work product
144	08.05.96		Reconciled disbursement summary	W-P	Produce	Not work product
145	08.05.96		Reconciled disbursement summary	W-P	Produce	Not work product
146	08.05.96		Reconciled disbursement summary	W-P	Produce	Not work product
147	08.05.96		Reconciled disbursement summary	W-P	Produce	Not work product
148	Undated		Report on likely exposure from trust reconciliation, noting settlement strategy	W-P	Withhold	Work product

III.C.3 Arthur Anderson Documents						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
171	06.08.90	Assoc. Solicitor to Arthur Anderson	Information on litigation and claims for audit	W-P	Withhold	Work product
172	03.30.89	Asst. Solicitor to Arthur Anderson	Information on litigation and claims for audit	W-P	Withhold	Work product
203	Undated		Chart weighing scenarios in *Cobell*	W-P	Withhold	Work product
204	Undated		Chart weighing scenarios in *Cobell*	W-P	Withhold	Work product
205	10.16.96		IMPL accounting for *Cobell*	W-P	Withhold	Work product
206	10.24.95		IMPL accounting for *Cobell*	W-P	Withhold	Work product
207	10.24.95		IMPL accounting for *Cobell*	W-P	Withhold	Work product
208	10.24.95		IMPL accounting for *Cobell*	W-P	Withhold	Work product
209	10.16.96		IMPL accounting for *Cobell*	W-P	Withhold	Work product
213	03.30.89	Asst. Solicitor to Arthur Anderson	Information on litigation and claims for audit	W-P	Withhold	Work product

III.C.4 Other Tribal Litigation						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
32	08.28.72	Commissioner to Assoc. Solicitor	Deposit and timber issues in pending *Cheyenne* case	A-C W-P	Withhold	Privileged; work product
33	09.29.71	Solicitor to DOJ Litigation Chief	Increasing interest rates and impact on *Navajo* litigation	A-C W-P	Withhold	Privileged; work product

III.C.4 Other Tribal Litigation						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
34	01.24.96	Assoc. Solicitor to Solicitor	Options for resolving tribal claims in response to trust reconciliation project	W-P	Withhold	Work product
40	08.11.71	Acting Assoc. Solic. to Commissioner	Seeking client explanation related to *Navajo* litigation	A-C W-P	Withhold	Privileged; work product
43	09.30.97	Special Trustee to Solicitor and DOJ	Answers to attorney questions on tribal trust funds in *Cobell*	A-C W-P	Withhold	Privileged; work product
46	07.25.90	Acting Area Dir. to Asst. Field Solicitor	Liability for restoring overpayments to Pueblo related to litigation	A-C W-P	Withhold	Privileged; work product
47	07.25.90	Acting Area Dir. to Asst. Field Solicitor	Liability for restoring overpayments to Pueblo related to litigation	A-C W-P	Withhold	Privileged; work product
58	10.23.87	Assoc. Solicitor to Assoc. Director	Indian oil and gas payments in *Shii Shi* litigation	A-C W-P	Withhold	Privileged; work product
68	12.14.70	Acting Assoc. Solicitor to Solicitor	Investment alternatives for trust funds in outside Treasury deposits	W-P	Produce, but redact n.1 on p.2	Fiduciary exception, except work product footnote
83	09.10.79	Investments to Regional Solicitor	IIM interest in *Dominique*	A-C W-P	Withhold	Privileged; work product
84	02.28.01	Acting Dep'y Solic. to various DOI offices	Communications with special master in *Cobell*	A-C W-P	Withhold	Privileged; work product
99	12.14.70	Acting Assoc. Solicitor to Solicitor	Investment alternatives for trust funds in outside Treasury deposits	W-P	Withhold	Duplicate of #68
107	06.02.99	Interior Chief of Staff to various DOI offices	Document retention related to *Cobell* litigation	W-P	Withhold	Work product
113	02.23.88	Acting Reg'l Solic. to Acting Assoc. Solic.	Agua Caliente Act and potential litigation	W-P	Withhold	Work product

III.C.4 Other Tribal Litigation						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
114	10.21.85	Acting Asst. Dir. to All Area Directors	IMPL escrow payments made to plaintiffs in *Mitchell*	W-P	Withhold	Work product
120	01.24.96	Assoc. Solicitor to Solicitor	Options for resolving tribal claims in response to trust reconciliation project	A-C W-P	Withhold	Privileged; work product
125	Undated		Summary of options for IIM accounting in advance of settlement	W-P	Withhold	Work product
126	Undated		Summary of options for IIM accounting in advance of settlement	W-P	Withhold	Work product
158	12.14.70	Acting Assoc. Solicitor to Solicitor	Investment alternatives for trust funds in outside Treasury deposits	W-P	Withhold	Duplicate of #68
181	02.08.95	DOJ attorney to Trust Funds Mgmt	Report on Yakima procedures	A-C W-P	Withhold	Privileged; work product
189	07.21.83	Acting Assoc. Solic. to Asst. Secretary	Applicability of *Mitchell* to other BIA functions and potential liability	A-C	Produce	Fiduciary exception
190	07.21.83	Acting Assoc. Solic. to Asst. Secretary	Applicability of *Mitchell* to other BIA functions and potential liability	A-C	Produce	Fiduciary exception
212	07.21.83	Acting Assoc. Solic. to Asst. Secretary	Applicability of *Mitchell* to other BIA functions and potential liability	A-C	Produce	Fiduciary exception
216	07.21.83	Acting Assoc. Solic. to Asst. Secretary	Applicability of *Mitchell* to other BIA functions and potential liability	A-C	Withhold	Duplicate of #190
219	Undated		Proposed legislation in response to tribal trust reconciliation noting potential claims and settlement	W-P	Withhold	Work product

III.C.5 Administrative / Miscellaneous						
Doc	**Date**	**Sender / Recipient**	**Subject**	**Privileges Asserted**	**Ruling**	**Rationale**
97	05.15.75	Legislative Affairs to Legislative Counsel	Requesting review of draft bill	A-C	Produce	Fiduciary exception
109	04.11.02	Internal OST	Seeks to clarify conference call comments on settlement contract and cost-sharing	A-C	Withhold	Privileged
115	12.28.95	Deputy Solicitor to Trust Funds Mgmt.	Cover sheet transmitting edits to draft letter on reconciliation project	A-C	Produce	Not privileged
116	12.28.95		Suggests edits to draft letter on reconciliation project	A-C W-P	Produce	Fiduciary exception
117	12.28.95		Suggests edits to draft letter on reconciliation project	A-C W-P	Withhold	Duplicate of #116
118	12.28.95	Deputy Solicitor to Trust Funds Mgmt.	Cover sheet transmitting edits to draft letter on reconciliation project	A-C	Produce	Not privileged
119	12.28.95		Suggests edits to draft letter on reconciliation project	A-C W-P	Withhold	Duplicate of #116
173	05.30.89	Asst. Solicitor to Accounting Mgmt	Fund recovery from credit union	A-C	Produce	Not privileged
176	05.29.85	Special Asst. to Solicitor	Interest computations and outstanding balances on notes	A-C W-P	Withhold	Work product

[Attachment]

UNITED STATES COURT OF FEDERAL CLAIMS

No. 458a-79 L

THE SHOSHONE INDIAN TRIBES OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

No. 459a-79 L

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[Filed: May 16, 2002]

ORDER

The court has before it Defendant's Motion for a Protective Order Preventing the Deposition and Testimony of Richard K. Aldrich (Def.'s Mot.); Plaintiffs' Opposition to Defendant's Motion for a Protective Order Preventing the Deposition and Testimony of Richard K. Aldrich (Pls.' Opp.); and Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion for a Protective Order

Preventing the Deposition and Testimony of Richard K. Aldrich (Def.'s Reply). For the following reasons, defendant's motion is DENIED.

Defendant seeks a protective order preventing the deposition and testimony of Richard Aldrich, the sometime Field Solicitor at the United States Department of the Interior's Billings, Montana Regional Office. Def.'s Mot. at 2; Def.'s Reply at 1.

Defendant asserts that Mr. Aldrich provided legal advice to components of the Department of the Interior and, therefore, his testimony is protected by the attorney-client privilege and work product doctrine.[1] Def.'s Mot. at 2-3.

I. Background

In the late 1980s, Mr. Aldrich issued opinions concerning the ownership of sand and gravel. Def.'s Mot. at 2. Plaintiffs provided to the court copies of three memos that Mr. Aldrich authored and provided to several officials within the United States Department of the Interior. *See* Exhibits 1-3 to Pls.' Opp. The first memo, dated October 1, 1975, was addressed to an Area Direc-

---

[1] In footnote 1 of its motion, defendant alludes to the deliberative process privilege. Defendant does not explain why the deliberative process privilege may apply to its set of facts. Because defendant bears the burden under United States Court of Federal Claims Rule 26(c) to show "good cause" for the entry of protective order, the court believes defendant's bare reference to the deliberative process privilege is insufficient to grant a protective order on that basis. The court agrees with plaintiff that defendant had an obligation to assert the privilege in its original motion (so that the plaintiff would have had an opportunity to respond in its opposition) and the failure to do so constituted a waiver of the right to assert the deliberative process privilege. *See* Pls.' Opp. at 8.

tor and opines that "mineral reservation or restoration [does] not include sand and gravel." *See* Exhibit 1 to Pls.' Opp. The second memo, dated September 17, 1980, revokes the opinion contained in the October 1, 1975 memo pending the outcome of the appeal of the district court's decision in *Western Nuclear, Inc. v. Andrus*. *See Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 334 (10th Cir. 1981), *rev'd, Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983). *See* Exhibit 2 to Pls.' Opp. The second memo advises that the sand and gravel within the Riverton Unit of plaintiffs' reservation should be treated as if owned by the Shoshone and Arapahoe Tribes of the Riverton Project. *See id.* The third memo from Mr. Aldrich is a transmittal dated June 18, 1987, attaching a letter from a private law firm, White & White. *See* Exhibit 3 to Pls.' Opp. The substance of the letter from the law firm is a general discussion of ownership of the sand and gravel deposits on plaintiffs' reservation. *Id.*

II. Discussion

The attorney-client privilege does not apply here. First, the mere fact that an individual is an attorney is insufficient to bar his testimony at deposition or trial. If an attorney has personal knowledge of facts underlying the litigation, his testimony will be permitted.[2] The

---

[2] There is wide support in the case law for the view that an attorney may testify when he has personal knowledge as a fact witness. *See, e.g., Rainbow Investors Group, Inc. v. Fuji Trucolor Mo., Inc.*, 168 F.R.D. 34, 37 (W.D. La. 1996) (permitting deposition of attorney due to his involvement as a negotiator in business activity prior to litigation); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248-49 (D. Kan. 1995) (permitting attorney to be deposed because he was involved in underlying facts of litigation); *Kaiser v. Mutual Life Ins. Co.*

court agrees with plaintiffs that Mr. Aldrich, as an employee of the United States, was involved in determining the scope of the United States's trust responsibilities and is, therefore, a fact witness with personal knowledge relevant to the litigation. *See* Pls.' Opp. at 5.

Moreover, the fiduciary exception to the attorney-client privilege applies here. Under the fiduciary exception to the attorney-client privilege, the privilege does not apply to prevent disclosure to beneficiaries of communications between a trustee and its counsel concerning management and administration of the trust. *See In re Grand Jury Proceedings Grand Jury No. 97-11-8*, 162 F.3d 554, 556 (9th Cir. 1998) (citing *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976); *Comegys v. Glassell*, 839 F. Supp. 447, 448-49 (E.D. Tex. 1993).

There are two distinct rationales for this exception. First, the exception derives from a trustee's duty to disclose all information about a plan's administration to the plan's beneficiaries, a rationale which has had particular force in the ERISA context. *See, e.g., In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997) (holding that "an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration"); *Wildbur v. ARCO Chemical Co.*, 974 F.2d

---

of N.Y., 161 F.R.D. 378,382 (S.D. Ind. 1994) (finding deposition of attorney appropriate after determining that he was involved in underlying facts as either an actor or a witness); *Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993) (permitting deposition of opposing counsel because that attorney had concededly participated in disputed pre-litigation events which relate to the issues raised in litigation).

631, 645 (5th Cir. 1992) (holding that "an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration"); *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 496-97 (D. Conn. 1985) (ERISA fiduciary may not raise attorney-client privilege against beneficiary.). Second, a trustee, as the representative for the beneficiaries of a trust, is not the "real client" when he seeks advice about the administration of that trust. *See United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986) Rather, the beneficiaries are the "real client" being served by the advice concerning trust administration. *Id.* at 266.

Defendant argues that the fiduciary exception does not apply when beneficiaries bring suit against the trustee. Def.'s Reply at 2. However, in *Riggs*, the leading case finding the fiduciary exception, the beneficiaries had brought suit against the estate trustees. *See Riggs*, 355 A.2d at 710. In *United States v. Mett*, 178 F.3d 1058 (9th Cir, 1999), the case on which defendant relies, the court appears to narrow the fiduciary exception. *Mett*, which the court finds inapposite here, was a criminal case in which the court reversed the embezzlement convictions of a trustee. *Id.* at 1060. In *Mett*, the court found that where it is clear that the trustee has sought legal advice for his own personal benefit, that is, to defend himself, the attorney-client privilege exists. *Id.* at 1064.

In this case, the memos at issue related to management of the trust. The United States did not seek this information to defend itself from liability, but rather to understand the scope of the assets it was under a duty to protect in the administration of the trust. In these

circumstances, the fiduciary exception applies, and the testimony of Mr. Aldrich is discoverable.

Finally, defendant attempts to prevent the deposition of Mr. Aldrich by invoking the work product doctrine. The work product doctrine applies to attorney work produced in anticipation of litigation or for on-going litigation. Although this suit had been filed at the time these memos were written, the suit was in abeyance at the time. Moreover, it is apparent from their, face that these documents were written in the ordinary course of business, that is, the business of managing the trust; they were not produced for the purposes of the litigation. No reference is made to this litigation; no attorney-work-product reference appears on the face of the documents; and the content of the documents is of a general, informative nature. Accordingly, the work product doctrine does not apply.

III. Conclusion

For the foregoing reasons, defendant's motion is DENIED.

IT IS SO ORDERED.

/s/ EMILY C. HEWITT
EMILY C. HEWITT
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2009-M908

IN RE UNITED STATES, PETITIONER

[Filed: Apr. 22, 2010]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and a response thereto having been invited by the court and filed by the Respondent,* and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

---

* Amici Curiae, Navajo Nation and Pueblo of Laguna were granted leave to file a the Respondent's opposition to the Petitioner's combined petition for panel brief in support of rehearing and rehearing en banc.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 04/22/2010

cc: Brian C. Toth
Steven D. Gordon
Alan R. Taradash

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-251L

JICARILLA APACHE NATION, FORMERLY
JICARILLA APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Feb. 19, 2010

PROTECTIVE ORDER

This matter is before the court on Defendant's Unopposed Motion for a Protective Order. Upon consideration of the unopposed motion, the court finds that good cause exists for approval and entry of a protective order pursuant to RCFC 26(c) and Fed. R. Evid. 502(d). Entry of this order will accomplish the dual purposes of enabling discovery to proceed in this case while preserving defendant's claim of privilege over certain documents, pending any additional appellate review of this court's and the Federal Circuit's rulings on the applicability of the fiduciary exception to the attorney-client privilege in the case. *See* Docket Numbers ("Dkt. No.") 216, 225.

IT IS, THEREFORE, ORDERED:

1. **Scope.** This order shall govern the documents that, in the Order dated July 3, 2009, Dkt. Nos. 211, 216, this court has directed that defendant produce to plaintiff. Also, this Order shall govern all other documents hereinafter produced by defendant in this case in conformance with the decision in *In re United States*, 590 F.3d 1305 (Fed. Cir. 2009), and that defendant claims to be protected from discovery by virtue of the attorney-client privilege, in the absence of the application of the fiduciary exception, as defined in *In re United States*. Further, this order shall govern any deposition testimony given hereinafter that defendant claims to be protected from discovery by virtue of the attorney-client privilege, in the absence of the application of the fiduciary exception, as defined in *In re United States*.

2. **Non Waiver.** Production of documents and records by defendant pursuant to this order shall not be deemed a waiver of any claim of privilege in this court, this case, or any other Federal or State proceeding.

3. **Term.** This order shall become effective immediately, and it shall remain so, until after defendant has exhausted all additional appellate remedies with respect to *In re United States*, or until after all deadlines to pursue additional appellate remedies with respect to *In re United States*, have expired. In particular, this order shall remain effective until the later of the following events:

   a. The expiration of defendant's time to seek rehearing of *In re United States*, with the Federal Circuit, including all extensions of deadlines granted by the Federal Circuit;

b. Final disposition and the issuance of a mandate (if any shall be issued) by the Federal Circuit upon rehearing of *In re United States*;

c. Expiration of defendant's time to petition for certiorari to the Supreme Court for review of the opinion in *In re United States*, or any opinion or decision issued by the Federal Circuit upon rehearing in *In re United States*, including all extensions of deadlines granted by the Supreme Court;

d. Denial of any petition for certiorari by the Supreme Court as described in subparagraph (c) above; or

e. Final disposition of any certiorari proceedings by the Supreme Court in response to a petition for certiorari as described in subparagraph (c) above, including and extending through any further action by this court in response to the disposition by the Supreme Court.

4. **Copying and Labeling**. Documents or records subject to this order shall be stamped or otherwise labeled with the legend "PRIVILEGED OR CONFIDENTIAL—DO NOT DISCLOSE," and, if practical and reasonable under the circumstances, copies of electronic data, documents, or records shall also include the legend "PRIVILEGED OR CONFIDENTIAL—DO NOT DISCLOSE" in the file name and in a conspicuous place on the exterior of the CD-ROM, DVD, diskette, or other medium containing the record copies.

5. **Depositions**. If documents or records subject to this order are used as exhibits at deposition, the parties shall, upon receipt of the transcript of the deposition,

designate any pages thereof quoting from or paraphrasing the documents or records subject to this order, and those pages shall be stamped with the legend "PRIVILEGED OR CONFIDENTIAL—DO NOT DISCLOSE" and shall themselves be deemed to be protected records for purposes of this order.

6. **Confidential Documents and Records.** Any document or record produced by defendant to plaintiff pursuant to this order shall be kept strictly confidential by plaintiff, and plaintiff may disclose or provide access to such document or record only pursuant to this order, upon further order of the court, or as otherwise agreed in writing by the parties. Plaintiff shall not use the documents or records subject to this order, or their contents, for any purpose other than this case or any related administrative proceedings before the United States Department of the Interior.

7. **Further Disclosure or Access.** Unless otherwise authorized under paragraph above, each party may disclose or provide access to any documents or records subject to this order only to the following: (a) attorneys of record in this case and attorneys, paralegals, and office support staff working with the attorneys of record in the course of representing the parties herein; (b) plaintiff's tribal officials, witnesses, and experts, consultants, contractors, court reporters, and copying or computer service personnel retained by the parties or the parties' attorneys to assist in this case, and persons in their employ, *provided that* those individuals execute an acknowledgment as defined in paragraph 6 of the Confidentiality Agreement and Protective Order, Dkt. No. 69, before they gain access to such documents or records subject to this order; and (c) the court or any settlement

judge to whom this case is referred by court order, and the settlement judge's staff, consistent with paragraph 8 below.

8. **Filings and Submissions**. The parties shall not file with the court, in this case and at any time, any motion, brief, pleading, or other filing or submission which attaches, quotes, or paraphrases any document or record that is subject to this order, unless the subject portion of such filing or submission is filed under seal. Filings under seal shall be done by CM/ECF and pursuant to the RCFC 5.2(d) and Appendix E, paragraph 11. In the event that the Federal Circuit's opinion in *In re United States*, is modified or reversed, any documents filed pursuant to this order shall not be unsealed by the Clerk upon termination of this action under RCFC 77.3(c).

IT IS SO ORDERED.

/s/ FRANCIS M. ALLEGRA
FRANCIS M. ALLEGRA
Judge

APPENDIX E

UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-25L

JICARILLA APACHE NATION, FORMERLY JICARILLA APACHE TRIBE, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 26, 2002]

FIRST AMENDED COMPLAINT

Plaintiff, by and through its undersigned attorney, for its complaint, hereby alleges as follows:

INTRODUCTION

1. Plaintiff the Jicarilla Apache Nation (formerly known as the Jicarilla Apache Tribe and hereinafter referred to as "Jicarilla"), a federally recognized Indian tribe situated within the State of New Mexico, brings this action to obtain compensation for loss and damages due to Defendant's breaches of duties arising under treaties, executive orders, statutes and federal regulations and contractual documents such as oil and gas leases authorized under such treaties, executive orders, statutes and federal regulations.

Theses duties include, *inter alia*, Defendant's failures in its exercise of supervision, control and management over Plaintiff's trust funds and other trust property. The Defendant's fiduciary duties arise under federal law, and are components of the fiduciary relationship created by treaties, executive orders, statutes, regulations, and other documents that give rise to a trust relationship between the Defendant and the Plaintiff regarding specific trust property.

The Plaintiff also seeks an accounting by Defendant, as required under federal law regarding Indian trust funds and other assets to aid the Court in quantifying the damages caused by Defendant's failures to manage those trust funds and resources in accordance with its fiduciary duties.

Plaintiff asserts rights under federal law, to recover damages from the Defendant caused by Defendant's numerous and repeated failures to fulfill a variety of fiduciary obligations that Defendant owes Plaintiff with regard to the proper management and accounting by Defendant of trust funds and other trust assets which were placed under Defendant's care, custody and control by various federal treaties, executive orders, statutes, and laws governing the management of, and accounting for, Indian trust funds and trust assets by the United States as a trustee for an Indian Tribe.

During the period covered by this Complaint (August 14, 1946, to the present, except as may be provided otherwise below), the Defendant has never provided the Plaintiff with a complete, accurate and acceptable accounting due to Plaintiff by Defendant detailing and accounting for transactions concerning Plaintiff's trust

funds and trust assets under the custody and control of Defendant.

Plaintiff asks this Court to require Defendant to provide Plaintiff with a complete and accurate accounting of all of Plaintiff's trust funds and other trust assets which were at any time relevant hereto in the custody or control of Defendant from August 1946, to the present; to further declare that Defendant has breached its fiduciary duties with regard to the management of, and the accounting for, such trust funds and assets; to enjoin the Defendant from failing to preserve any and all records relevant to such trust funds and trust assets; to award Plaintiff damages occasioned by Defendant's fiduciary failures in the amount of Three Hundred Million Dollars; to award Plaintiff prejudgment interest as the law may provide; and, to further award Plaintiff attorneys fees and costs against the Defendant as the law may provide.

JURISDICTION

2. This Court has jurisdiction over this claim pursuant to 28 U.S.C. § 1491 and 8 U.S.C. § 1505, and because this is an action arising under the Constitution, treaties, and laws of the United States, *inter alia*:

a. The Act of December 22, 1987, Pub. L. No. 100-202 and the Act of September 27, 1988, Pub. L. No. 100-446, which require the Bureau of Indian Affairs ("the Bureau") to audit and reconcile tribal trust funds, and to provide tribes with an accounting of such funds.

b. The Act of October 23, 1989, Pub. L. No. 101-121, the Act of November 5, 1990, Pub. L. No.

101-512, and the Act of November 13, 1991, Pub. L. No. 102-154, all of which require the Bureau to audit, reconcile, and certify through an independent party the results of a reconciliation of tribal trust funds as the most complete reconciliation of such funds possible, and to provide tribes with an accounting of such funds.

c. The Act of October 25, 1994, (The American Indian Trust Fund Management Reform Act of 1994), Pub. L. No. 103-412, codified at 25 U.S.C. §§ 4001-4061 (1997), pertinent sections of which require:

(1) Section 101: charges the Secretary of Interior (Secretary) with a duty to provide periodic, timely reconciliations of tribal trust funds to assure the accuracy of accounts, and charges the Secretary with a duty to determine accurate cash balances of tribal trust funds.

(2) Section 102(c): requires the Secretary to cause an annual audit of all tribal trust funds to be conducted.

(3) Section 301: a Special Trustee for the American Indians is appointed to provide for more effective management of, and accountability for the proper discharge of trust responsibilities to Indian tribes, and to oversee and coordinate reforms within the Department of the Interior of practices relating to the management and discharge of such responsibilities.

(4) Section 303(b)(2)(A): charges the Special Trustee with a duty to monitor the reconciliation

of trust accounts to ensure that the Bureau provides account holders with a fair and accurate accounting of all trust funds.

(5) Section 303(d): charges the Special Trustee with a duty to provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems.

(6) Section 304(2)(A) and (B): charge the Secretary with a duty to report to Congress, identifying for each tribal trust fund a balance reconciled as of September 30, 1995. The Secretary's report must include an attestation by each tribe that the Secretary has provided the account holder with as full and complete an accounting as possible and that the tribe accepts the balance as reconciled by the Secretary, or that the tribe disputes the balance as reconciled, and if so, the report must provide an explanation why the tribe disputes the Secretary's balance.

(7) Section 304(3): charges the Secretary with a duty to provide a statement outlining the efforts the Secretary will undertake to resolve the tribe's dispute.

d. Other statutes describe specifically and generally the United States' duties as a fiduciary: in managing Plaintiff's trust funds (e.g., 25 U.S.C. §§ 161a, 161b, 162a), in leasing and accounting for the proper disposition of Plaintiff's trust mineral estate (e.g., the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 a-g, *et seq.*; the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 *et seq.*), and in managing and contracting for the sale of

Plaintiff's timber (e.g., the Act of June 25, 1910, 36 Stat. 857, codified as amended at 25 U.S.C. §§ 406, 407; the Act of Mar. 1, 1907, 34 Stat. 1018, codified as amended at 25 U.S.C. § 405; section 6 of the Indian Reorganization Act of 1934, 48 Stat. 986, codified at 25 U.S.C. § 466; and the National Indian Forest Resources Management Act of 1990, codified at 25 U.S.C. § 3101 *et seq.*). Other relevant treaties, executive orders, statutes, and regulations form additional jurisdictional bases for Plaintiff's claims regarding the trust funds and trust property managed by the Defendant (e.g., the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, U.S.-Mex. (securing to Indians in the Mexican Cession area, including New Mexico, preexisting rights under Mexican and Spanish land grants and law to land, water; and other property)).

3. Court also has jurisdiction over the subject matter of this action under a well developed body of federal case law describing and defining the fiduciary relationship between the United States and Plaintiff, created by the statutes listed above and by other relevant federal law, including treaties and regulations.

PARTIES

4. Plaintiff is a federally recognized Indian tribe, recognized by the Secretary as a sovereign Indian Tribe with legal rights and responsibilities, eligible for the special programs and services provided by the United States to Indians because of its status as an Indian tribe, and recognized as possessing powers of limited self-government.

5. Defendant United States has numerous federal trust responsibilities owed to the Plaintiff, with respect to Plaintiff's trust assets and trust funds at issue herein. The Defendant employs various federal agencies to perform these fiduciary obligations owed to Plaintiff. The Bureau of Indian Affairs ("the Bureau") is the federal agency within the Department of the Interior most directly responsible for generally discharging the United States's Indian trust responsibilities. The Office of Trust Funds Management ("the OTFM"), currently headquartered in Albuquerque, New Mexico, is the office within the Bureau most directly responsible for specifically discharging the Secretary's and the Bureau's responsibilities with respect to Plaintiff's trust funds at issue herein. The Special Trustee for American Indians ("the Special Trustee"), duly appointed by the Secretary, is charged by Congress with the duties and responsibilities enumerated in the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001-4061 (1997).

BACKGROUND

ESTABLISHMENT AND ADMINISTRATION OF THE PLAINTIFF'S TRUST FUNDS

6. Historically, Plaintiff was recognized by the United States as the reservation titleholder of approximately 900,000 acres of land, and its subsurface, in the State of New Mexico. The reservation contained large deposits of oil and gas reserves which have had, and continue to have, great economic value. The reservation also contained lesser amounts of valuable timber, gravel, grazing lands, and other trust resources.

7. Upon information and belief. from the late 1800s until the present, the United States held in trust for Plaintiff proceeds derived from disposition of its reservation timber and gravel resources or leases of its lands or other uses of its lands (all under the direct supervision and control of the United States) which generated proceeds. These monies were held in trust and managed exclusively by the United States in the United States Treasury for Plaintiff's benefit.

8. Beginning in the early 1950's and continuing to the present, the United States as Plaintiff's trustee has authorized and managed hundreds of leases and agreements regarding oil and gas and other trust resources on Plaintiff's trust lands.

9. Pursuant to terms of 25 U.S.C. §§ 161a, 161h, and 162a, the United States deposited royalties, made disbursements, and accrued interest and investment income on undisbursed amounts of Plaintiff's Trust Accounts and engaged in all other aspects of its exclusive management of Plaintiff's trust funds.

10. Prior to August 14, 1951, the Plaintiff filed an action against the Defendant pursuant to the Indian Claims Commission Act, 60 Stat. 1049, codified at 25 U.S.C. § 70 *et seq.* (1976 ed.), now repealed and omitted. The Plaintiff filed a Second Amended Petition in that action stating claims for mismanagement of the Plaintiff's trust funds and resources, which additional claims were assigned to Docket No. 22-K. On February 21, 1974, the Indian Claims Commission entered judgment in the amount of seven million dollars ($7,000,000) in favor of the Plaintiff pursuant to a Stipulation for Final Judgment ("Stipulation") executed by the Plaintiff

and the Defendant and dated February 5, 1974. The Stipulation provided in part:

> Plaintiff shall be barred thereby from asserting any further rights, claims or demands against the defendant and any future action on said accounting claim or other claims for accounting of monies or properties of the Tribe up to and including the date of final award herein, *except claims for mismanagement of oil and gas resources and diversion of water rights arising since August 13, 1946, and not within the jurisdiction of the Indian claims Commission, as set forth in paragraph II below.*

(Emphasis added).

Plaintiff alleges that the Stipulation did not absolve the Defendant of its duties to manage properly and account for Plaintiff's trust funds and other assets prior to February 21, 1974, but recognizes that the Court may conclude that Stipulation restricts in some respects the time period for which damages may be recovered by Plaintiff in this action.

THE UNITED STATES' OBLIGATION TO RECONCILE, ACCOUNT AND AUDIT THE PLAINTIFF'S TRUST FUNDS

11. Throughout the entire approximate 200 year history of the United States' unilaterally imposed assumption of fiduciary duties as trustee of resources and monies belonging to tribes, the United States has never rendered an audit or accounting of trust funds to any such beneficiary tribes, including Plaintiff Tribe, pursuant to generally accepted audit standards or accounting principles. *See, Misplaced Trust: Bureau of Indian Affairs'*

Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499, 102d Cong., 2d Sess. (1992).

12. Throughout the period August 14, 1946, to the present, the United States has never provided Plaintiff an accounting or audit of the disposition of its trust funds, consistent with generally accepted accounting principles or audit standards.

13. Upon information and belief, in the mid-1980s, the United States entered into contract negotiations with the Mellon Bank, to have the latter take over from the Bureau and perform all deposit, crediting, disbursing, investment and other administrative activities of tribal and individual Indian trust funds, including Plaintiff's trust funds.

14. Upon information and belief, the terms of a contract with the Mellon Bank were never completed because pursuant to the Act of December 22, 1987, Pub. L. No. 100-202, Congress required of the Bureau, that before any of the United States' fiduciary duties as trustee for the administration of tribal and individual Indian trust funds could be transferred to another entity, the Bureau must audit and reconcile tribal trust funds, and provide tribes with an accounting of such funds.

15. By the Act of October 23, 1989, Pub. L. No. 101-121, the Act of November 5, 1990, Pub. L. No. 101-512, and the Act of November 3, 1991, Pub. L. No. 102-154, Congress reaffirmed the mandates of the Act of December 22, 1987. In the above-entitled statutes, Congress added the additional requirement that the Bureau must certify through an independent party the results of the reconciliation of tribal trust funds as the most complete reconciliation possible of such funds.

16. On October 25, 1994 Congress enacted the American Indian Trust Fund Management Reform Act, codified at 25 U.S.C. §§ 4001-4061 (1997) (herein "the Trust Fund Reform Act"). Among other responsibilities, Congress requires in the Trust Fund Reform Act the following:

a. The Secretary has a duty to provide periodic, timely reconciliations to assure the accuracy of tribal and individual Indian trust accounts.

b. The Secretary has a duty to determine accurate cash balances in tribal and individual Indian trust accounts.

c. The Secretary shall cause an annual audit of all trust funds to be conducted.

d. A Special Trustee for the American Indians (herein "the Special Trustee") is appointed to provide for more effective management of, and accountability for the proper discharge of trust responsibilities to Indian tribes, and to oversee and coordinate reforms with the Department of practices relating to the management and discharge of such responsibilities.

e. The Special Trustee has a duty to monitor the reconciliation of trust accounts to ensure that the Bureau provides account holders with a fair and accurate accounting of all trust accounts.

f. The Special Trustee has a duty to provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems.

THE "TRUST FUND RECONCILIATION PROJECT" AND THE RESULTS THEREFROM

17. On May 24, 1991, the United States, entered into a contract with Arthur Andersen, LLP ("the Bureau/Andersen Contract") for the latter to perform accounting activities to assure that the Bureau's accounting records and account balances in the tribal and individual trust accounts were reconciled as accurately as possible back to the earliest date practicable, using available accounting records and transaction data. The services actually performed by Andersen are herein referred to as "the Reconciliation Project."

18. The purpose of the Bureau/Andersen Contract was for the Bureau to fulfill its statutory obligation to provide tribes an audit, reconciliation, and accounting of all trust funds, as described above in paragraphs 14 and 15.

19. Upon information and belief, from 1991 to 1995 Andersen performed certain accounting procedures agreed upon between the Bureau and Andersen, purportedly to fulfill obligations of the Bureau/Andersen Contract described in paragraph 17, with respect to Plaintiff's trust funds.

20. On January 8, 1996, the Special Trustee delivered to Plaintiff a report prepared by Andersen and entitled "Agreed-Upon Procedures and Findings Report for the Jicarilla Apache Tribe, July 1, 1972 Through September 30, 1992" ("the Andersen Report"). On or about February 14, 1996, the Special Trustee delivered to Plaintiff a Compact Disc (CD) containing electronic scans of documents that purportedly are transactional records pertaining to Plaintiff' s trust funds.

21. On January 8, 1996, the Bureau delivered to Plaintiff a "Summary and Detail of Trust Funds Report, Fiscal Years 1993-03/31/95; Asset and Transaction Statement, 04/01/95; 09/30/95" ("the Bureau Report"), containing the Bureau's accounting, reconciliation and reconstruction procedures for the period October 1, 1992 through September 30, 1995 to arrive at the September 30, 1995 balances reported. The tribal trust fund account reconciliation work performed by the Bureau utilized as starting balances those amounts which Andersen generated as ending balances on September 30, 1992.

22. In the Andersen Report, Andersen made the following statements to Plaintiff, with regard to its findings:

> a. The primary objective of the Reconciliation Project was to reconstruct historical transactions, to the extent practicable, for all years for which records are available for all tribal trust funds managed by the Bureau. Andersen did not state that a primary objective was to reconcile the *balances of tribal trust funds.*
>
> b. Because the procedures utilized by Andersen in the Reconciliation Project did not constitute an audit made in accordance with generally accepted auditing standards, Andersen did not express an opinion on the accuracy of any of its findings.

23. On January 12, 1996, Defendant informed Plaintiff that despite its duty described above in paragraph 15, the United States had not obtained an independent certification from the accounting firm of Coopers & Lybrand, LLP, in the form of an attest, service, exami-

nation, compilation or agreed-upon procedures report certifying that the procedures performed and findings made by Andersen in the Andersen Report were adequate, reliable and complete.

24. On June 11, 1996, the Special Trustee testified before the Senate Committee on Indian Affairs that the Reconciliation Project was concluded in December, 1995.

25. On August 19, 1996, the United States entered into a contract with Andersen for the latter to provide support services including, among others, access and presentation of Andersen's work papers to tribal representatives.

26. Section 304(2)(A) and (B) of the Trust Fund Reform Act, 25 U.S.C. § 4044 states that the Secretary has a duty to report to Congress, identifying for each tribal trust fund a balance reconciled as of September 30, 1995. It further states that the Secretary's report shall include an attestation by each tribe that the Secretary has provided the account holder with as full and complete an accounting as possible and that the tribe accepts the balance as reconciled by the Secretary, or that the tribe dispute the balance as reconciled, and provides an explanation why the tribe disputes the Secretary's balance.

27. In order to fulfill the Secretary's duty described above in paragraph 26, on January 8, 1996, the Special Trustee requested that Plaintiff state in an "Acknowledgement" form provided by the Special Trustee, whether the Plaintiff accepts the findings of the Andersen Report as a full and complete accounting, and whether Plaintiff accepts the balances of its trust funds, reflected in the Andersen Report findings, as reconciled by the Secretary. Plaintiff disagrees with those posited balances.

28. Plaintiff alleges that the Bureau/Andersen Report findings do not reflect reliable, accurate and complete amounts of the losses incurred in Plaintiff's trust funds from their dates of inception through 1995, which losses are the result of the United States' mismanagement of the trust funds and other trust assets. Among the Bureau Andersen Report deficiencies are the following:

a. The reconciliation and reconstruction procedures designed by the Bureau and Andersen contain a significant design flaw, namely, the assumption utilized by the Bureau and Andersen that an accurate accounting of the Plaintiff's trust funds will result from the summation of those entries recorded by the Bureau in its accounting, system which are supported by accomplished source documents. The design does not adequately address the possibility that transactions not recorded by the Bureau in its accounting system may occur and be material in amount to Plaintiff, or that the allocations and calculations performed by the Bureau's staff were inaccurate, unauthorized, or improperly recorded. This design flaw is significant and apparent cause the internal control structure and accounting and financial management systems utilized by the Bureau to account for tribal trust funds historically contain significant deficiencies.

b. Most significantly, the reconstruction and reconciliation procedures performed by Andersen fail to adequately address the accounting inaccuracies that might result from the United States' failure to credit Plaintiff's Trust Account the complete royalty amounts due from the hundreds of producing oil

and gas leases on Plaintiff's trust lands administered, controlled and managed by Defendant.

c. Defendant has a well documented history of failure to enforce Plaintiff's oil and gas lease terms and other rights arising under treaties, executive orders, statutes, and federal law, resulting in under collection by Defendant and a loss, therefore, to Plaintiff's trust funds of amounts that should have been collected by Defendant and deposited to the credit of Plaintiff's trust funds.

d. Upon information and belief, Defendant similarly has failed to fulfill its fiduciary duties arising under treaties, executive orders, statutes, regulations, and contractual documents to collect the full amounts available or due with respect to other trust resources of the Plaintiff.

e. Based upon the extensive inadequacies in the Bureau's internal control structure, as reported by the independent public accountants of Griffin and Associates, P.C. on May 17, 1996, which existed during the period when the Bureau was performing the reconstruction and reconciliation procedures for 1992 to 1995 for Plaintiff's trust funds, it is not prudent for Plaintiff to rely on any work product produced by Bureau personnel, including the Bureau Report findings.

f. The procedures performed in the Reconciliation Project were exclusively designed and agreed-upon by Andersen and the Bureau. The procedures were not consistent with generally accepted auditing standards. Based upon the inadequate historical performance of the Bureau in managing and account-

ing for tribal trust funds and the extent of its involvement in the Andersen procedures, Plaintiff concludes that it is not prudent for Plaintiff to accept the procedures designed by Andersen and the Bureau as being sufficient to produce an accounting that would be complete and accurate.

g. The certification contract with Coopers & Lybrand might have compensated for the weakness described in the previous sub-paragraph, but the certification process was procedures performed were adequate to produce a complete and full accounting to Plaintiff. In fact, upon information and belief, Plaintiff asserts that the Coopers & Lybrand contract was terminated precisely *because it was about to attest to the wholesale inadequacies of the Bureau/Andersen Reconciliation Project and the fact that the "account balances" asserted therein for Plaintiff and other tribes could not be relied upon and were not in compliance with the Congressional mandate in the Trust Reform Act of 1994.*

h. The Andersen Report contains scope limitations, including a limited time period, beginning only from 1972, and Andersen's assertion of its inability to perform basic reconciliation procedures because of missing transactional records.

29. Plaintiff alleges that in order to know complete and accurate balances to its trust funds an audit is required, and in order to perform the audit, review is necessary of all records in the possession, custody or control of the Defendant, including any of it agencies and agents, Andersen, and other available sources pertaining to the management of Plaintiff's trust funds and

trust property including, but not limited to the calculations of royalty amounts for the volume, quality and value of oil and gas and timber severed and removed from Plaintiff's reservation.

THE SPECIAL TRUSTEE AND THE SECRETARY INTEND TO BRING THE UNITED STATES' MISMANAGEMENT OF THE TRIBAL TRUST FUNDS TO CLOSURE BASED UPON ANDERSEN'S FINDINGS IN THE RECONCILIATION PROJECT

30. On December 11, 1996, the Secretary informed the Chairmen of the House Resources Committee and the Senate Committee on Indian Affairs that the Reconciliation Project accounting activities were completed.

31. On December 11, 1996, the Secretary submitted to the Chairmen of the House Committee on Resources and the Senate Committee on Indian Affairs a report entitled "Department of the Interior's Proposed Legislative Options in Response to the Tribal Trust Fund Reconciliation Project Results." The proposed options are based upon the Andersen Report findings for Plaintiff and all other tribes.

31. In the report described in the previous paragraph, the Secretary stated that he intended to present final tribal trust fund settlement options to Congress by April, 1997.

FIRST CLAIM FOR RELIEF

32. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 31, above.

33. Defendant's actions as alleged hereinabove establish that, throughout all time periods relevant hereto,

Defendant exercised (and continues to exercise) broad authority and control over Plaintiff's trust funds and other trust property pursuant to treaties, executive orders, statutes, regulatory structure and other federal law from which emanates the fiduciary role the Defendant has demanded for itself vis à vis Plaintiff and Plaintiff's trust property.

34. As alleged hereinabove, the Defendant's activities vis à vis Plaintiff and Plaintiff's trust property at issue herein are subject to comprehensive statutory and regulatory structures of Defendant as executed by various branches and departments of the Executive Branch of the United States.

35. Defendant's activities aforesaid are those of a fiduciary relative to Plaintiff and Plaintiff's trust property. Defendant routinely failed (and continues to fail) to fulfill these fiduciary obligations causing economic loss to Plaintiff, Plaintiff's trust funds, and other trust property of Plaintiff.

36. Defendant's activities as alleged hereinabove are, in addition, those of a fiduciary, i.e., a trustee that controls and manages the Plaintiff's trust funds and trust resources pursuant to treaty, executive order, statute, regulation, and federal law. Defendant is possessed of, has exercised and continues to exercise, Congressionally mandated control, supervision, and management responsibilities as a fiduciary vis à vis Plaintiff and Plaintiff's trust funds and trust resources including all appurtenant duties thereto.

37. The Defendant's breaches of the fiduciary obligations detailed hereinabove has resulted in (and continue to result in) losses to, as well as mismanagement of, Plaintiff's trust funds and other trust property.

38. Due to Defendant's failure to fulfill its fiduciary duties to Plaintiff arising under treaty, executive orders, statutes, regulations, and federal law, all as alleged hereinabove, in the proper management of Plaintiff's trust assets and trust funds, on the basis of information made available to Plaintiff, Plaintiff has suffered damage caused by Defendant's breach of fiduciary obligations in the amount of Three Hundred Million ($300,000,000.00) Dollars.

SECOND CLAIM FOR RELIEF

39. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 38, above.

40. Because the Defendant has failed to provide an accounting consistent with the requirements of generally accepted accounting principles and auditing standards, the Plaintiff is entitled to an order of this Court compelling such an accounting to aid the Court in a final determination of damages that Plaintiff is entitled to.

41. Ancillary to this demand for an accounting, Plaintiff is entitled to an order from this Court directing Defendant to assure the preservation of all records relating to Plaintiff's trust funds as well as all records pertaining to the underlying royalty income stream into the trust funds, namely, those relating to volume, quality and value of oil and gas, and timber severed and removed from Plaintiff's reservation.

42. Under applicable federal law trust principles between the United States as trustee and an Indian tribal beneficiary, explicitly and implicitly under the federal statutes that require the Bureau to perform an audit, reconciliation and certification, Plaintiff is entitled to all information about its trust funds and income producing

trust assets and the Bureau's execution of its trust funds for which Plaintiff has any reasonable use. This includes all relevant information about the terms of the trust, its present status, past acts of management or other incidents of the administration of the trust, including investments, which information is in the custody, possession or control of the United States or its agents. So long as these requests are made at a reasonable time and place, the trustee is obliged to give the tribal beneficiary the information which it has requested. Plaintiff requests that this Court enter an appropriate Order providing Plaintiff with this information.

THIRD CLAIM FOR RELIEF

43. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 42, above.

44. Congress directed the Bureau, Special Trustee, and Secretary to do a reconciliation, audit, and certification for the primary purpose of providing Plaintiff the most complete and accurate balances possible of its trust funds. Defendant failed to do so. Further, Defendant's actions as alleged constitute a breach of the Defendant's duty of loyalty and good faith owed to Plaintiff within the context of the trust relationship alleged hereinabove. Plaintiff is entitled to a fundamental duty of undivided loyalty from the United States to fulfill these Congressional mandates.

45. Plaintiff is entitled to declaratory and injunctive relief against the Defendant, declaring that Defendant owes Plaintiff a fiduciary duty of loyalty to forbid its agent Andersen from imposing any restrictions or fee requirements on Plaintiff's right to review and photocopy any records in Andersen's possession, custody or

control pertaining to Plaintiff's trust funds, including all Andersen work papers.

WHEREFORE, Plaintiff respectfully requests the Court award the following relief:

1. To take jurisdiction of this action;

2. To award Plaintiff Three Hundred Million ($300,000,000.00) Dollars in damages against Defendant;

3. To order Defendant to perform a complete accounting for all trust funds and trust assets of Plaint if fin Defendant's care, custody, or control from August 14, 1946 to the present;

4. To immediately order Defendant to preserve *all* records of any kind whatsoever pertaining to Plaintiff's trust funds as well as other trust assets during the pendency of this action, until further order of this Court;

5. To grant Plaintiff prejudgment interest, costs and attorneys fees in this litigation as may be provided by law.

6. To grant such other and further relief as the Court deems proper and appropriate.

Dated: Aug. 26, 2002

Respectfully submitted,

/s/ ALAN R. TARADASH

ALAN R. TARADASH
Attorney of Record for Plaintiff
Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
500 Marquette Ave. NW Suite 1050
Albuquerque, NM 87102
(505) 243-4275

Of Counsel:
Thomas J. Peckham
Daniel I.S.J. Rey-Bear
Shane C. Youtz
Deidre A. Lujan
Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
500 Marquette Ave. NW Suite 1050
Albuquerque, NM 87102
(505) 243-4275

and

Donald H. Grove
Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
Suite 300
816 Connecticut Avenue, NW
Washington, D.C. 20006
(202) 530-1270

APPENDIX F

May 31, 1979

Honorable Cecil D. Andrus
Secretary of Interior
Washington, D.C.

Dear Mr. Secretary:

As you know, the Department of Justice has long represented the United States in litigation for the purpose of protecting Indian property rights secured by statutes or treaties. This has been and will continue to be an important function of this Department, and I would like to set forth my understanding of the legal principles governing its conduct.

In fulfillment of the special relationship contemplated in the Constitution between the Federal Government and the Indian tribes, the Congress has enacted numerous laws and the Senate has ratified numerous treaties for the benefit and protection of Indian tribes and individuals, their property and their way of life. Where these measures require implementation by the Executive Branch, the administrative responsibility typically resides with the Secretary of the Interior. 43 U.S.C. § 1457(10). The Attorney General is in turn responsible for the conduct, on behalf of the United States, of litigation arising under these statutes and treaties. This obligation in Indian cases is but one aspect—albeit and important one—of the Attorney General's statutory responsibility for the conduct of litigation in which the United States or an agency or officer thereof is a party or is interested. 28 U.S.C. §§ 516, 519.

The Secretary of the Interior and the Attorney General perform their duties here, as in all other areas, under the superintendence of the President. We are the President's agents in fulfilling his constitutional duty to take care that the laws be faithfully executed. Where a particular statute, treaty, or Executive Order manifests a purpose to benefit all Indians or a tribe or individual Indians or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. In your role as Secretary of the Interior, you are charged with administering most of the laws and treaties applying to Indians and are often in a policy formulating role with regard thereto. And where litigation is concerned, it is the duty of the Attorney General to ensure that the interest of the United States in accomplishing the congressional or executive purpose is fully presented in court.

The Executive and Judicial Branches have inferred in many laws extending federal protection to Indian property rights in the intent that the Executive act as a fiduciary in administering and enforcing these measures. Where applicable law imposes such standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders or to recognize that they are to be performed with the same faithfulness to legislative and executive purpose as are the obligations devolving upon this branch of the federal establishment generally.

A significant portion of the litigation with which we are here concerned relates to property rights reserved

to a tribe by treaty or in the creation of a reservation or property which Congress has directed be held in trust, managed, or restricted for the benefit of a tribe or individual Indian. When the Attorney General brings an action on behalf of the United States against private individuals or public bodies to protect these rights from encroachment, he vindicates not only the property interests of the tribe or individual Indian, as they may appear under law to the United States, but also the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective.

There is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all people of the Nation. This functional thesis upon which our form of government is premised —the Separation of Powers—pre-supposes that the people as a whole benefit when the Executive Branch enforces the laws enacted, and protects Indian property rights recognized in treaty commitments ratified, by a coordinate branch. The fact that an identifiable class realizes tangible benefits from litigation brought by the Federal Government does not distinguish Indian cases from many civil rights, labor, and other cases. Just as we go to court to enforce the laws designed to protect minorities from discrimination or disenfranchisement by the majority, we must litigate when necessary to protect rights secured to Indians without reference to whether any present majority of the citizenry would profit from, or otherwise embrace, that action.

It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus,

in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

The litigating position adopted by the Attorney General on behalf of the United States may affect your administrative and policy-making functions. Accordingly, with respect to all litigation in which the Attorney General represents the United States in protecting Indian property would expect to receive—and would most carefully consider—the advice of your Department, possessing as it does the primary policy responsibility in Indian matters.

Where there are other statutory obligations imposed on the Executive in a particular case aside from those affecting Indians, faithful execution of the laws require the Attorney General to resolve these competing or over-lapping interests to arrive at a single position of the United States. In arriving at a single position, however, we must also take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the especial relationship and special responsibilities of the government toward Indians.

And, finally, the President's duty faithfully to execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty to propose to the Congress measures he believes necessary and expedient. These measures may —indeed must—be framed with the interest of the Nation as a whole in mind. In so doing, the President has the constitutional authority to call on either of us for our views on legislation to change existing law notwithstanding the duty to execute the law as it now stands.

I look forward to close cooperation between our two Departments in these matters.

Yours sincerely,

Griffin B. Bell
Attorney General

APPENDIX G

The following charts display pending lawsuits by Indian tribes against the United States relating to tribal trust management both in the Court of Federal Claims and in federal district courts (94 pending as of September 9, 2010):

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
1	*Ak-Chin Indian Community v. United States* No. 06-cv-00932-ECH
2	*Belgarde v. United States* No. 07-cv-00265-CFL
3	*Blackfeet Tribe of the Blackfeet Indian Reservation v. United States* No. 02-cv-00127-LSM
4	*Cheyenne River Sioux Tribe v. United States* No. 06-cv-00915-NBF
5	*Chippewa Cree Tribe of the Rocky Boy's Reservation; Little Shell Tribe of Chippewa Indians; Turtle Mountain Band of Chippewa Indians; White Earth Band of Chippewa Indians v. United States* (Pembina Judgment Fund) No. 92-cv-00675-ECH
6	*Coeur d'Alene Tribe v. United States* No. 06-cv-00940-EJD

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
7	*Colorado River Indian Tribes v. United States* No. 06-cv-00901-LAS
8	*Confederated Tribes of the Goshute Reservation v. United States* No. 06-cv-00912-EGB
9	*Crow Creek Sioux Tribe v. United States* No. 05-cv-1383L-MCW
10	*Delaware Tribe of Indians and the Delaware Trust Board v. United States* No. 02-cv-00026-FMA
11	*Eastern Shawnee Tribe of Oklahoma v. United States* No. 06cv00917-CFL
12	*[Eastern] Shoshone Indian Tribe of the Wind River Reservation v. United States, [Northern] Arapahoe Indian Tribe of the Wind River Reservation v. United States* No. 79-cv-00458-ECH (consolidated with No. 06-cv-00903-ECH)
13	*Gros Ventre Tribe and Assiniboine Tribe v. United States* No. 06-cv-00931-NBF

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
14	*Haudenosaunee and Onodaga Nation v. United States* No. 06-cv-00909-TCW
15	*Hoopa Valley Tribe v. United States* No. 06-cv-00908-LMB
16	*Hopi Tribe v. United States* No. 06-cv-00941-CFL
17	*Iowa Tribe of Kansas and Nebraska v. United States* No. 06-cv-00920-EJD
18	*Jicarilla Apache Nation v. United States* No. 02-cv-00025-FMA
19	*Kaw Nation of Oklahoma v. United States* No. 06-cv-00934-FMA
20	*Lower Brule Sioux Tribe v. United States* No. 06-cv-00922-LB
21	*Makah Tribe of the Makah Reservation v. United States* No. 06-cv-00889-LJB
22	*Miami Tribe of Oklahoma v. United States* No. 08-cv-00104-LMB

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
23	*Muscogee (Creek) Nation of Oklahoma v. United States* No. 06-cv-00918-JFM
24	*Navajo Nation v. United States* No. 06-cv-00945-FMA
25	*Nez Perce Tribe v. United States* No. 06-cv-00910-CFL
26	*Northwestern Band of Shoshone Indians v. United States* No. 06-cv-00914-LB
27	*Oglala Sioux Tribe v. United States* No. 05-cv-1378L-RHH
28	*Omaha Tribe of Nebraska v. United States* No. 06-cv-00911-NBF
29	*Osage Nation of Oklahoma v. United States* No. 99-cv-00550-ECH (consolidated with 00-169)
30	*Otoe-Missouria Tribe of Indians of Oklahoma v. United States* No. 06-cv-00937-LAS

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
31	*Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California, v. United States* No. 06-cv-00897-MCW
32	*Prairie Band of Potawatomi Indians v. United States* No. 06-cv-00921-LJB
33	*Pueblo of Laguna v. United States* No. 02-cv-00024-FMA
34	*Quechan Tribe of the Fort Yuma Indian Reservation v. United States* No. 06-cv-00888-SGB
35	*Red Cliff Band of Lake Superior Chippewa Indians v. United States* No. 06-cv-00923-JPW
36	*Rosebud Sioux Tribe v. United States* No. 06-cv-00924-JFM
37	*Round Valley Indian Tribes v. United States* No. 06-cv-00900-SGB
38	*Salt River-Pima-Maricopa Tribes v. United States* No. 06-cv-00943-LMB

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
39	*Seminole Nation of Oklahoma v. United States* No. 06-cv-00935-MMS
40	*Soboba Band of Luiseno Indians v. United States* No. 06-cv-00894-NBF
41	*Sokaogon Chippewa Community (aka Mole Lake Band of Lake Superior Chippewa Indians) v. United States* No. 06-cv-00930-LJB
42	*Stillaguamish Tribe of Indians v. United States* No. 06-cv-00916-NBF
43	*Swinomish Indian Tribal Community v. United States* No. 06-cv-00899-FMA
44	*Tohono O'odham Nation v. United States* No. 06cv00944-EGB (on cert to SCT)
45	*Tonkawa Tribe of Indians of Oklahoma v. United States* No. 06-cv-00938-BAF
46	*United Keetoowah Band of Cherokee Indians in Oklahoma v. United States* No. 06-cv-00936-TCW

No.	Names and Civil Docket Numbers of Cases Filed in United States Court of Federal Claims
47	*Ute Indian Tribe of the Uintah and Ouray Reservation v. United States* No. 06-cv-00866-MCW
48	*Winnebago Tribe of Nebraska v. United States* No. 06-cv-00913-MMS
49	*Wolfchild v. United States* No. 03-cv-02684-CFL
50	*Wyandot Nation of Kansas v. United States* No. 06-cv-00919-LMB
51	*Yomba Shoshone Tribe v. United States* No. 06-cv-00896-EJD

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
1	*Ak-Chin Indian Community v. Salazar* No. 06-cv-02245-TFH
2	*Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Salazar* No. 02-cv-00035-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
3	*Cheyenne River Sioux Tribe v. Salazar* No. 06-cv-01897-TFH
4	*Chippewa Cree Tribe of the Rocky Boy's Reservation v. Salazar* No. 02-cv-00276-TFH
5	*Coeur d'Alene Tribe v. Salazar* No. 06-cv-02242-TFH
6	*Colorado River Indian Tribes v. Salazar* No. 06-cv-02212-TFH
7	*Confederated Tribes of the Colville Reservation v. Salazar* No. 05-cv-02471-TFH
8	*Confederated Tribes of the Goshute Reservation v. Salazar* No. 06-cv-01902-TFH
9	*Crow Creek Sioux Tribe v. Salazar* No. 04-cv-00900-TFH
10	*Eastern Shawnee Tribe of Oklahoma v. Salazar* No. 06-cv-02162-TFH
11	*Gila River Indian Community v. Salazar* No. 06-cv-02249-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
12	*Haudenosaunee and Onondaga Nation v. Salazar* No. 06-cv-02254-TFH
13	*Iowa Tribe of Kansas and Nebraska v. Salazar* No. 06-cv-01899-TFH
14	*Lower Brule Sioux Tribe v. Salazar* No. 05-cv-02495-TFH
15	*Muscogee (Creek) Nation of Oklahoma v. Salazar* No. 06-cv-02161-TFH
16	*Nez Perce Tribe; Mescalero Apache Tribe; Tule River Indian Tribe; Hualapai Tribe; Yakama Nation; Klamath Tribes; Yurok Tribes; Cheyenne-Arapaho Tribe; Pawnee Nation; Sac and Fox Nation; Santee Sioux Tribe; Tlingit-Haida Tribes; Bad River Band of Lake Superior Chippewa Indians; Bois Forte Band of Chippewa; Cachil Dehe Band of Wintun Indians of Colusa Rancheria; Confederated Salish & Kootenai Tribes; Confederated Tribes of Siletz Indians; Grand Traverse Band of Ottawa and Chippewa Indians; Kenaitze Indian Tribe; Lac Courte Oreilles Band of Ojibwe; Leech Lake Band of Ojibwe; Minnesota Chippewa Tribe; Nooksack Indian Tribe; Prairie*

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
	Island Indian Community; Pueblo of Zia; Rincon Luiseno Band of Indians; Samish Indian Nation; San Luis Rey Indian Water Authority; Spirit Lake Dakotah Nation; Spokane Tribe of Indians; Summit Lake Paiute Tribe; Tulalip Tribes; Ute Mountain Ute Tribe (Plaintiff-intervenors: *Caddo Tribe of Oklahoma; Kickapoo Tribe of Kansas; Sault Ste. Marie Tribe of Chippewa Indians; Shoalwater Bay Indian Tribe; Skokomish Tribal Nation; Kaibab Band of Paiute Indians of Arizona; Lac du Flambeau Band of Lake Superior Chippewa; Qawalangin Tribe; Aleut Community of St. Paul Island (Aleutian Pribilof Island Restitution Trust); Native Village of Atka) v. Salazar* No. 06-cv-02239-TFH
17	*Northern Cheyenne Tribe of Indians v. Salazar* No. 06-cv-02250-TFH
18	*Northwestern Band of Shoshone Indians v. Salazar* No. 06-cv-02163-TFH
19	*Oglala Sioux Tribe v. Salazar* No. 04-cv-01126-TFH
20	*Omaha Tribe of Nebraska v. Salazar* No. 04-cv-00901-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
21	*Osage Tribe of Indian of Oklahoma v. United States* No. 04-cv-00283-TFH
22	*Passamaquoddy Tribe of Maine v. Salazar* No. 06-cv-02240-TFH
23	*Pechanga Band of Luiseno Mission Indians v. Salazar* No. 06-cv-02206-TFH
24	*Prairie Band of Potawatomi Nation v. Salazar* No. 05-cv-02496-TFH
25	*Red Cliff Band of Lake Superior Indians v. Salazar* No. 06-cv-02164-TFH
26	*Rosebud Sioux Tribe v. Salazar* No. 05-cv-02492-TFH
27	*Salt River Pima-Maricopa Indian Community v. Salazar* No. 06-cv-02241-TFH
28	*Shoshone-Bannock Tribes of the Fort Hall Reservation v. Salazar* No. 02-cv-00254-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Court for District of Columbia
29	*Sokaogon Chippewa Community v. Salazar* No. 06-cv-02247-TFH
31	*Standing Rock Sioux Tribe v. Salazar* No. 02-cv-00040-TFH
31	*Stillaguamish Tribe of Indians v. Salazar* No. 06-cv-01898-TFH
32	*Te-Moak Tribe of Western Shoshone Indians v. Salazar* No. 05-cv-02500-TFH
33	*Tohono O'Odham Nation v. Salazar* No. 06-cv-02236-TFH
34	*United Keetoowah Band of Cherokee Indians in Oklahoma v. United States* No. 1:08cv01087-TFH
35	*Winnebago Tribe of Nebraska v. Salazar* No. 05-cv-02493-TFH
36	*Wyandot Nation of Kansas v. Salazar* No. 05-cv-02491-TFH
37	*Yankton Sioux Tribe v. Salazar* No. 03-cv-01603-TFH

No.	Names and Civil Docket Numbers of Cases Filed in United States District Courts in Oklahoma
1	*Alabama-Quassarte Tribal Town v. United States* No. 06-cv-00558-RAW (E.D. Okla.)
2	*Chickasaw Nation and Choctaw Nation v. Department of the Interior* No. 05-cv-01524 (W.D. Okla.)
3	*Kaw Nation v. Salazar* No. 06-cv-01437-W (W.D. Okla.)
4	*Otoe-Missouria Tribe of Oklahoma v. Salazar* No. 06-cv-01436-C (W.D. Okla.)
5	*Ponca Tribe of Indians of Oklahoma v. United States* No. 06-cv-01439-C (W.D. Okla.)
6	*Seminole Nation of Oklahoma v. Salazar* No. 06-cv-00556-SPS (E.D. Okla.)
7	*Tonkawa Tribe of Indians v. Salazar* No. 06-cv-01435-F (W.D. Okla.)

APPENDIX H

1. 25 U.S.C. 162a provides, in pertinent part:

Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required

* * * * *

(d) Trust responsibilities of Secretary of the Interior

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

2. 25 U.S.C. 4011 provides:

Responsibility of Secretary to account for the daily and annual balances of Indian trust funds

(a) Requirement to account

The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title.

(b) Periodic statement of performance

Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify—

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) Annual audit

The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title, and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit.

3. 25 C.F.R. 115.1000(a) provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under this part, including the operation of a trust program pursuant to 25 U.S.C. 450f *et seq.*; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
NOV 19 2010
OFFICE OF THE CLERK

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

STEVEN D. GORDON
Counsel of Record
SHENAN R. ATCITTY
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Respondent

QUESTION PRESENTED

Whether the United States is entitled to a writ of mandamus allowing it to withhold from an Indian tribe, based on the attorney-client privilege, communications between the government and its attorneys concerning the management of tribal trust funds when those communications are not alleged to involve any governmental interest competing with the fiduciary duty to manage those funds for the benefit of the tribe.

TABLE OF CONTENTS

COUNTERSTATEMENT ..... -1-
REASONS FOR DENYING THE PETITION ..... -5-

A. The Interlocutory Posture Of This Case Makes It Appropriate For Resolving The Applicability Of The Fiduciary Exception ..... -6-

1. There is no compelling reason to depart from the final judgment rule in this case ..... -6-
2. The Court of Appeals' refusal to issue a writ of mandamus is particularly unsuited to interlocutory review -- 10-

B. The Federal Circuit Correctly Applied The "Fiduciary Exception" To The Government ..... -12-

1. The government acts as a trustee in managing Indian trust assets ..... -13-
2. Jicarilla is the "real client" of legal advice about the management of its trust assets ..... -15-
3. As a trustee, the government has a fiduciary duty to disclose legal advice about trust management to Jicarilla ..... -17-

CONCLUSION ..... -23-

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Board of County Comm'rs v. Seber,318 U.S. 705 (1943) 17

Cavanaugh v. Wainstein, 2007 WL 1601723 (D.D.C. 2007) 78

Cheney v U.S. Dist. Ct., 542 U.S. 367 (2004) 11, 12

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 21
212 F.R.D. 24 (D.D.C. 2002)..... 7, 8
No. 03-5063, 2003 WL 22136383 (D.C. Cir. Sept. 9, 2003)..... 8
No. 03-5084, 2003 WL 22867626 (D.C. Cir. Dec. 2, 2003) 8

Cramer v. United States, 261 U.S. 219 (1923) 20

Dept. of the Interior v. Klamath Water Users Protective Assoc., 532 U.S. 1 (2001).....21, 22

Director, Ofc. of Workers Compensation Progs. v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995) 15

Heckman v. *United States*, 224 U.S. 413 (1912) 15

Hoopa Valley Indian Tribe v. Ryan,
415 F.3d 986 (9th Cir. 2005) 14

Lincoln v. Vigil,
508 U.S. 182 (1993) 13

Mohawk Industries, Inc. v. Carpenter,
130 S.Ct. 599 (2009) 6, 7, 9, 10, 11

Morton v. Ruiz,
415 U.S. 199 (1974) 19

Nevada v. United States,
463 U.S. 110 (1983) 13, 14

NLRB v. Amax Coal Co.,
453 U.S. 322 (1981) 13

Osage Nation and/or Tribe of Indians of Oklahoma v United States, 66 Fed. Cl. 244 (2005) 7

Poafpybitty v. Skelly Oil Co.,
390 U.S. 365 (1968) 15

Randolph Central School Dist. v. Aldrich,
506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari) 6

Riggs Nat'l Bank v. Zimmer,
355 A.2d 709 (Del. Ch. 1976) 16

Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States,
Nos. 458-79 and 459-79 (Fed. Cl. May 16, 2002) 7

364 F. 3d 1339 23

Trammel v. United States,
445 U.S. 40 (1980) 9

United States v. Candelaria,
271 U.S. 432 (1926) 15

United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) 13

United States v. Minnesota,
270 U.S. 181 (1926) 15

United States v. Mitchell,
463 U.S. 206 (1983) 14

United States v. Navajo Nation,
537 U.S. 488 (2003) 18
129 S.Ct. 1547 (2009) 19

United States v. Weber Aircraft Corp.,
465 U.S. 792 (1984) 18

United States v. White Mtn. Apache Tribe,
537 U.S. 465 (2003) 22

STATUTES AND RULES

28 U.S.C. § 1254(1) 6

Act of December 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329 20

Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915 23

Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990 23

Act of October 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374 23

Act of November 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379 23

Act of September 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499 23

Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321 23

American Indian Trust Fund Management Reform Act of 1994 21
25 U.S.C. § 162a(d) 21

Indian Tucker Act, 28 U.S.C. § 1505 .....18, 19

Tucker Act, 28 U.S.C. § 1491 19

Fed. R. Evid. 501 .....3, 18

OTHER MATERIALS

Felix Cohen, *Federal Indian Law* (2005)....13, 14

Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Legal Ethics 163, 198 (2007) 10

Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 at 5 (1992) 20

Restatement (Second) of Trusts (1959) 22

COUNTERSTATEMENT

1. In 2002, the Jicarilla Apache Nation (Jicarilla) commenced this breach of trust action aginst the United States in the Court of Federal Claims (CFC). The litigation was stayed for more than five years while the parties participated in an alternative dispute resolution (ADR) process. By agreement, the first phase of the ADR process addressed claims relating to the government's management of certain Jicarilla trust accounts during the period from 1972 through 1992. The Government produced many thousands of documents to Jicarilla, but also withheld a large number of documents as privileged. App. 25a.

In 2008, at Jicarilla's request, the case was restored to an active litigation track. The CFC divided the case into phases for trial and established a discovery schedule. The first phase addresses the alleged mismanagement of trust accounts that had been the focus of the ADR proceedings. App. 26a.

Jicarilla filed a motion to compel the Government to produce some 226 documents withheld from production during the ADR process based on various claims of privilege. The government agreed to produce 71 of the documents but maintained its privilege claims as to the remainder, which the government delivered to the CFC for *in camera* review. App. 26a.

2. In July 2009, the CFC ruled on the parties' discovery motions and granted in relevant part Jicarilla's motion to compel. App. 24a-90a. The CFC, like all other federal courts that had previously

addressed the issue, concluded that the "fiduciary exception" to the attorney-client privilege required the government, as a fiduciary, to disclose to the beneficiary communications relating to the management of Indian trust assets. App. 44a.

The CFC explained that two principal justifications for the "fiduciary exception" have been advanced by the courts. The first is that "the fiduciary is not the exclusive client of the attorney rendering advice, but rather is obtaining that advice either as a proxy for the beneficiaries or jointly therewith." App. 41a. The second is that the exception "deriv[es] from the fiduciary's duty to keep the beneficiary informed of issues involving trust administration." App. 42a. The CFC concluded that there is nothing about the fiduciary relationship between the United States and Indian tribes, or the statutes and treaties from which that relationship springs, that renders the "fiduciary exception" inapplicable to the government. App. 45a. Accordingly, the CFC ordered the production of 75 of the documents in issue.[1] App. 50a-63a, 69a, 71a-84a.

3. The United States petitioned the Federal Circuit for a writ of mandamus directing the CFC to vacate its production order. That court granted a temporary stay but ultimately denied the mandamus petition. App. 1a-23a. It held that "the United

---

[1] The remaining documents that the CFC permitted to be withheld were primarily duplicates of documents that it ordered to be produced or were covered by the work product doctrine, which the CFC ruled is not subject to the fiduciary exception.

States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." App. 1a-2a.

The Federal Circuit commenced its analysis by noting that, pursuant to Fed. R. Evid. 501, it interprets privileges on a case-by-case basis according to principles of the common law. App. 7a. The court traced the history and development of the fiduciary exception to the attorney-client privilege. It observed that the exception is well established in federal courts and that federal trial courts previously had applied this exception to the United States in at least three Indian trust cases. App. 9a-14a.

The circuit court concluded that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception." App. 14a. It cited decisions of this Court and a number of statutes that establish or recognize the existence of a trust relationship between the United States and the Indian people. App. 15a-16a. The court found that the two principal justifications for the fiduciary exception both apply in this case. First, Jicarilla was the "real client" of the advice the Department of the Interior (Interior) sought about how to manage trust funds and other tribal assets. App. 15a. Second, as a trustee, the United States has a fiduciary duty to

disclose information related to trust management to the beneficiary tribes, including legal advice on how to manage trust funds. App. 21a.

The Federal Circuit considered and rejected the government's various arguments about why these rationales should not apply to it. The court acknowledged that, unlike other trustees, the government may sometimes be required to balance its fiduciary duties to tribes with other statutory duties. In this case, however, there is no allegation that the documents at issue involve any such balancing of competing interests. Thus, the court reserved the question whether the fiduciary exception applies to communications in which a specific competing interest actually was considered. App. 18a-19a.

The court was unmoved by the argument that the fiduciary exception is inapplicable because government attorneys are paid out of congressional appropriations rather than the trust corpus. The court noted that the government had imposed the trust on the tribes, and it saw no reason why use of public funds to pay for legal advice about trust management should bar the tribes from accessing that advice. App. 19a-20a.

Nor did the court accept the government's argument that applying the fiduciary exception would impair the Secretary of the Interior's ability to obtain confidential legal advice. It noted that this same concern could be stated by any trustee and concluded that this concern is outweighed by the rationales supporting application of the fiduciary exception. App. 20a.

Finally, the court rejected the argument that Interior's duty to disseminate information to tribes is limited to what Congress has required in the 1994 Indian Trust Fund Management Reform Act. The court found this argument "completely without merit" because the 1994 Act explicitly recognizes the possibility of additional trust responsibilities beyond those enumerated therein. App. 21a-22a.

4. The United States filed a petition for rehearing and for rehearing en banc which the Federal Circuit denied on April 22, 2010. App. 91a-92a. Meanwhile, the CFC set a new deadline for production of the documents and, on February 19, 2010, issued a protective order that prevents disclosure to third parties until the government has exhausted all additional appellate remedies. App. 93a-97a. The government thereafter produced the documents to Jicarilla.

REASONS FOR DENYING THE PETITION

This Court should deny the petition in this case. First, it is premature because the case is interlocutory and the government has presented no substantial reason why the Court should engage in review before final judgment. The decision of the Federal Circuit does not conflict with any decision of this Court or any other federal court. The United States simply seeks error correction of a factbound determination by the Federal Circuit. Second, this case involves the denial of a writ of mandamus. The government fails to establish that it has no other adequate means to attain relief and that its

entitlement to mandamus is "clear and indisputable." Finally, and in any event, the decision below was correct.

A. The Interlocutory Posture Of This Case Makes It Inappropriate For Resolving The Applicability Of The Fiduciary Exception

1. There is no compelling reason to depart from the final judgment rule in this case

a. This Court ordinarily does not exercise its discretion to review a nonfinal judgment of a court of appeals under 28 U.S.C. § 1254(1). *See Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari). Interlocutory decisions compelling disclosure of documents contrary to a claim of attorney-client privilege are no exception. As this Court explained last Term, "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009). The decision in *Mohawk* reflects the Court's "healthy respect for the virtues of the final-judgment rule" and its recognition that piecemeal, prejudgment appeals undermine efficient judicial administration and encroach upon the prerogatives of trial judges. *Id.* at 605.

The United States, which opposed interlocutory review of attorney-client privilege issues in *Mohawk*, now asks the Court to make an about-face. But the government does not squarely acknowledge the interlocutory posture of this case because it has no

credible argument that a post-judgment appeal would be ineffective.

b. There exists no circuit split or conflict in authority that might warrant setting aside the final judgment rule and considering at this juncture whether the fiduciary exception to the attorney-client privilege applies to the government when it acts as a trustee. Contrary to the government's suggestion that the decision below is novel and "upends settled expectations" regarding the applicability of the attorney-client privilege, Cert. Pet. 10, every court to have considered the issue has agreed with the Court of Appeals. In decisions dating back to 2002, federal courts uniformly have applied the fiduciary exception in Indian trust cases. *See* App. 85a-90a (May 2002 CFC Order in *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, Nos. 458-79 and 459-79); *Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002); *Osage Nation and/or Tribe of Indians of Oklahoma v. United States*, 66 Fed. Cl. 244, 247-53 (2005); *see also Cavanaugh v. Wainstein*, 2007 WL 1601723, at *9 (D.D.C. 2007) (fiduciary exception recognized in breach of fiduciary duty action against members of the Federal Retirement Thrift Investment Board).

Heretofore, the government has avoided litigating the fiduciary exception before a court of appeals. The government filed appeals of the 2002 ruling in *Cobell*, but subsequently dismissed those appeals voluntarily. The D.C. Circuit noted pointedly that, "[i]n moving for voluntary dismissal of these appeals, the federal appellants have waived any right to pursue their currently pending

challenges to the district court's application of the fiduciary exception to the attorney-client privilege and the work product doctrine." No. 03-5063, 2003 WL 22136383 (D.C. Cir. Sept. 9, 2003); *see also* No. 03-5084, 2003 WL 22867626 (D.C. Cir. Dec. 2, 2003) (making same statement in dismissing appeal of Secretary Norton, individually).

Thus, the settled expectation is that the fiduciary exception applies to the government as it does to other trustees. It is the government that now seeks to upset this expectation.

c. The government presents two arguments for why this matter presents an important question worthy of certiorari, which presumably are meant to override this Court's reluctance to grant interlocutory review. It asserts that the Federal Circuit's decision "threatens significant adverse consequences" because it would affect some 90 pending cases seeking billions of dollars from the government, and because it allegedly will chill consultation on tribal trust issues. Cert. Pet. 30-33. Neither contention is persuasive.

First, the government claims that interlocutory review is needed in this case because of the billions of dollars in potential liability that it faces collectively in Indian trust cases. But billions of dollars were at stake in the *Cobell* case, yet the government chose to acquiesce in the district court's ruling on the fiduciary exception and dismiss its appeal. No emergency has arisen since 2003 that justifies extraordinary interlocutory review of the

fiduciary exception issue at this juncture, seven years later.

Furthermore, the issue presented here does not affect the standard for determining whether the government is liable for breach of trust. Rather, it only affects the narrow issue of whether the government can prevent discovery of certain documents that may help establish whether a breach of trust occurred. The government does not explain how delaying the answer to *that* narrow question itself potentially implicates billions of dollars. Meanwhile, the application of the fiduciary exception does no injustice to the government because it advances the "predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citation omitted).

Second, interlocutory review is not justified based on the government's argument that application of the fiduciary exception will chill consultation between agency personnel who administer Indian trust assets and the government attorneys who advise them. This Court concluded in *Mohawk* that "deferring review [of attorney-client privilege issues] until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." 130 S. Ct. at 607. The government does not explain why that general rule does not apply in this case. Nor does the government demonstrate that any chilling of consultations has resulted from the application of the fiduciary exception in Indian trust cases for the past eight years.

Applying the fiduciary exception to the government simply treats it like other trustees. No adverse consequences have resulted from the widespread application of the fiduciary exception to private trustees. Moreover, for government employees, "[t]he protection afforded by the [attorney-client] privilege is already uncertain, due to various open government provisions and political and media pressures, yet government employees continue to communicate with sufficient candor to allow government attorneys to provide effective representation." Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Legal Ethics 163, 198 (2007). The government's "chill" argument is unpersuasive; it is not grounded in reality and has already been rejected by this Court in *Mohawk*.

2. The Court of Appeals' refusal to issue a writ of mandamus is particularly unsuited to interlocutory review

The United States could have sought interlocutory review of the fiduciary exception issue by asking the CFC to certify an appeal pursuant to 28 U.S.C. § 1292(b). *See Mohawk*, 130 S. Ct. at 607. The government did not do so. Rather, it chose to petition the Court of Appeals for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). App. 5a. This case's posture as a mandamus petition renders it a particularly unsuitable vehicle for this Court to resolve the applicability of the fiduciary exception to the government.

a. Only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of the "extreme remedy" of mandamus." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). Three conditions must be satisfied before the writ may issue. "First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires -- a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-81 (internal quotation marks and citations omitted). "Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks and citations omitted). And "[t]hird, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*

The government's petition ignores this standard and treats the case as if the only issue is whether the Court of Appeals erred in denying its claim of privilege. The government never attempts to show that it has a "clear and indisputable" right to issuance of the writ. Nor does the government demonstrate that it has no other adequate means of obtaining relief, an insurmountable burden given this Court's recent admonition that "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." *Mohawk*, 130 S. Ct. at 606. These failures are reason enough to deny the government's petition.

b. Accepting the government's invitation to decide this case as if it were presented in an ordinary procedural posture would transform mandamus from an "extraordinary remedy," *Cheney*, 542 U.S. at 380, into a "substitute for the regular appeals process," *id.* at 380-81. The Court should reject this invitation, particularly because the government has provided no explanation for why a post-judgment appeal -- either in this case, or in one of the other cases the government identifies as pending -- would be insufficient to protect its rights.

B. The Federal Circuit Correctly Applied The "Fiduciary Exception" To The Government

Not only does the petition fall far short of satisfying the criteria for interlocutory review, but it is clear that the Federal Circuit, like every other federal court to have considered the issue, concluded correctly that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception." App. 14a.

At issue here is the government's management, not of public assets, but of assets that belong to Indians. Indian beneficiaries are equally deserving of, and entitled to, the legal advice provided to their fiduciary regarding the management of their trust assets as beneficiaries of private trusts. Nonetheless, the government contends that the rationales for the fiduciary exception are vitiated in Indian trust cases because (1) unlike private trustees, it manages tribal trust property as a "sovereign function" and sometimes may have other

statutory responsibilities that conflict with tribal interests -- although it does not claim that any such conflict exists here, and (2) no statute or regulation requires it to communicate all relevant information about trust management to Indian tribes and no such common law duty can be imposed on it. These contentions do not withstand scrutiny.

1. The government acts as a trustee in managing Indian trust assets

a. "[T]he law is 'well established that the Government in its dealing with Indian tribal property acts in a fiduciary capacity.'" *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987)). Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.'" Felix Cohen, *Handbook of Federal Indian Law* § 5.04(4)(a) (2005). "Courts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981).

b. In seeking to avoid the presumption that it should be treated like other trustees, the government relies principally on the decision in *Nevada v. United States*, 463 U.S. 110 (1983), where this Court permitted the government to represent Indian tribes in litigation even though Congress had obliged it to represent other interests as well. A

private trustee could not engage in such dual representations.

But *Nevada* does not hold or suggest that the rules applicable to private trustees should not generally be applied to the Government. Instead, the Court acknowledged "[i]t may be that where only a relationship between the Government and the Indian tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Id.* at 142. Three days later the Court issued its seminal decision in *United States v. Mitchell*, 463 U.S. 206 (1983), which applied the common law of trusts to Indian breach of trust claims. Thus, the import of *Nevada* is that "[t]he government's trust obligations . . . can coexist with its other responsibilities. . . . the government may satisfy a range of statutory responsibilities while still honoring its trust obligations to Indians." *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 993 (9th Cir. 2005).

The communications at issue in this case do not involve any balancing of competing, non-fiduciary interests by the government. App. 18a. The court of appeals reserved the question whether the fiduciary exception would apply to communications in which the government or its attorneys had considered a specific competing interest. App. 19a. That issue is not presented here.[2]

---

[2] Should the unusual situation arise where the government does consider a specific competing interest in the course of managing Indian trust assets, the rationale for the fiduciary

c. None of the other cases cited by the government[3] support the proposition that it has conflicting responsibilities in managing tribal trust assets, or owes a lesser duty to Indian tribes than do private trustees. Rather, these cases establish that the government, as a sovereign, may have standing to protect Indians and Indian property rights even when a private trustee might not.[4] In other words, the government sometimes can do more than a private trustee could to protect Indian trust assets. These cases do not suggest that the government has a lesser fiduciary obligation to Indians than would a private trustee.

2. Jicarilla is the "real client" of legal advice about the management of its trust assets

a. The government argues that an Indian tribe cannot be the "client" of the Attorney General and other government attorneys, but this miscasts the

---

exception would not be undermined. The Indian beneficiary still would deserve access to the legal advice on which the government relied in reconciling its obligations and deciding how to manage the trust assets.

[3] *Heckman* v. *United States*, 224 U.S. 413 (1912); *United States v. Minnesota*, 270 U.S. 181, 194 (1926); *United States v. Candelaria*, 271 U.S. 432 (1926).

[4] *See Dir., Office of Workers Comp. Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 133 (1995) (*Heckman* held that the government's status as guardian confers standing to represent the interests of Indians); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) ("The obligation and power of the United States to institute . . . litigation to aid the Indian in the protection of his rights in his allotment were recognized in [*Heckman* and *Candelaria*].")

"real client" issue. The seminal decision in *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), articulated the "real client" concept as follows: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. . . . The very intention of the communication is to aid the beneficiaries." *Id.* at 713-14. Thus, "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust." *Id.* at 714.

Plainly, this concept applies to advice that government attorneys provide about the management of Indian trust assets -- the purpose of those communications is to aid the Indian beneficiaries. Accordingly, just as in *Riggs*, the policy of full disclosure in the trustee-beneficiary relationship outweighs the need for confidential communications between those trustees and their attorneys.

b. The "real client" concept does not turn on finding a formal attorney-client relationship between the trustee's attorney and the beneficiary. Rather, it focuses on the substance of the legal advice at issue and for whose benefit it is given. If the purpose of the advice is to aid the trust beneficiary, then the beneficiary is deemed the "real client" and is entitled to disclosure of the communications at issue.

The government's argument that there is no statutory or regulatory basis for creating an attorney-client relationship between government

attorneys and an Indian tribe is immaterial. And the views of the Department of Justice about the identity of its client and the role of its attorneys are also irrelevant to deciding the "real client" issue.

Finally, the fact that government attorneys are paid with public funds rather than the trust corpus, and that the government owns the records reflecting communications with its attorneys, are of no import.[5] In some cases involving private trustees, the source of payment may indicate for whose benefit the legal advice was being sought. But it does not do so in this case. It definitely does not alter the conclusion that advice about the management of Indian trust assets was sought to aid the trust beneficiary.

3. As a trustee, the government has a fiduciary duty to disclose legal advice about trust management to Jicarilla

The government argues that no statute or regulation imposes on it a general duty to communicate to Indian beneficiaries material facts affecting their interest in trust assets and so this common law fiduciary duty cannot be extended to it. This argument fails for multiple reasons.

---

[5] It can be argued that Indians have already "paid" for the government's trust services by ceding most of their lands to the United States. As this Court noted, "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them a[] . . . dependent people, needing protection . . . . Of necessity the United States assumed the duty of furnishing that protection . . . ." *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

a. The government upends the applicable law by contending that "the absence of any statutory or regulatory duty that Interior disclose confidential communications ... about tribal trust administration is dispositive" of the privilege issue presented here. Cert. Pet. 25. To the contrary, Fed. R. Evid. 501 specifies that, "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court ... the privilege of a ... government ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984).

The salient point is not whether Congress has required the disclosure of allegedly privileged information to Indians; it is that Congress has not authorized relevant information to be withheld from Indians regarding the management of their trust assets.

b. The government also misreads the Court's jurisprudence regarding trust obligations owed to Indians. The *Navajo Nation* decisions,[6] like other decisions addressing the government's liability to Indians for breach of trust, focus on the necessity of a statutory or regulatory obligation because that is the prerequisite for jurisdiction under the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28

---

[6] *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

U.S.C. § 1505. Where jurisdiction under these Acts is at issue, principles of trust law cannot substitute for a statutory or regulatory obligation, although trust principles are relevant in making the second stage determination whether Congress intended damages to remedy a breach of the statutory or regulatory obligation. *See Navajo Nation*, 129 S. Ct. at 1551-52. But the fiduciary exception has nothing to do with jurisdiction. Rather, it relates to what evidence is available to prove a breach of trust claim where the jurisdictional requisites of the Tucker Act or Indian Tucker Act have been satisfied. Those jurisdictional prerequisites have no place in the analysis here.

This Court has never held that all of the government's trust responsibilities to Indians must be spelled out in a specific statutory or regulatory mandate. To the contrary, the Court has enforced duties based on the trust relationship that are not derived from any statute or regulation. In *Morton v. Ruiz*, 415 U.S. 199 (1974), for example, a unanimous Court held that Indians who lived near a reservation were entitled to general assistance benefits despite a Bureau of Indian Affairs (BIA) manual that limited the benefits to those who lived on a reservation. The court concluded that Indians living near reservations had a "legitimate expectation" of these benefits based on the BIA's representations to Congress when seeking funds. Thus, "[t]he denial of benefits to these [Indians] under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" 415 U.S. at 236.

Likewise, in *Cramer v. United States*, 261 U.S. 219 (1923), the Court voided a federal land patent which had granted Indian-occupied lands to a railway. Relying heavily on the trust relationship with the Indians, and the national policy protecting Indian land occupancy, the Court found that the general statutory authority of federal officials to issue land patents was limited, even though Indian occupancy of the lands was not expressly protected by treaty, executive order, or statute. *Id.* at 227-29. The Court stated that "(t)he fact that such [Indian] right of occupancy finds no recognition in any statute or other formal Governmental action is not conclusive." *Id.* at 229.

c. Congress, for its part, has never suggested that the government's fiduciary obligations to Indians are limited to specific statutory and regulatory provisions. In 1992, for example, Congress stated that "[t]he most fundamental fiduciary responsibility of the government, and the Bureau [of Indian Affairs], is the duty to make a full accounting of the property and funds held in trust for the . . . beneficiaries of Indian trust funds." "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 at 5 (1992). Yet it was not until 1987 that Congress enacted a statute specifically requiring that Indian trust accounts be audited and reconciled. *See* Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329. Obviously, this does not mean that, prior to 1987, the government had no duty to account to Indian beneficiaries regarding the property and funds held in trust for them.

Congress later enacted the American Indian Trust Fund Management Reform Act of 1994, which "recognized and reaffirmed ... that the government has longstanding and substantial trust obligations to Indians ... not the least of which is a duty to account." *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001). The Act provides that "the [Interior] Secretary's proper discharge of the trust responsibilities of the United States [to Indians] shall include (but are not limited to) the following [eight categories]."[7] 25 U.S.C. § 162a(d) (emphasis added). "In other words, [Congress recognized that] the government has other responsibilities not enumerated in the 1994 Act." *Cobell v. Norton*, 240 at 1100.

d. The government, itself, has previously argued to this Court that it has common law trust obligations to Indians. In *Department of the Interior v. Klamath Water Users Protective Association*, the

---

[7] (1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

government, citing the Restatement (Second) of Trusts, asserted that it has a duty to an Indian beneficiary not to disclose to a third person information which it has acquired as trustee where the effect would be detrimental to the interest of the beneficiary. *See* 532 U.S. 1, 15 n.6 (2001), and Brief for Petitioners at 17, 36.[8]

e. In any event, the government's statutory obligation to make a full accounting to Indian beneficiaries regarding their assets includes a duty to communicate material facts affecting the beneficiaries' interest in the trust assets. This Court uses common law trust principles to flesh out the government's fiduciary duties to Indians under statutes and regulations. *See United States v. White Mtn. Apache Tribe*, 537 U.S. 465, 475 (2003) (applying the common law duty to preserve trust assets). It is firmly established at common law that "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *Restatement (Second) of Trusts* § 173 cmt. c (1959).

Congress clearly intends that this common law rule apply to the government. When it directed that Indians be given trust accountings, Congress also provided that the statute of limitations shall not commence to run on Indian breach of trust claims until an accounting is furnished from which the

---

[8] The Court found it unnecessary to decide whether the government has this trust duty because, in *Klamath*, any such duty was overcome by the statutory mandate of the Freedom of Information Act. *See* 532 U.S. at 15-16 & n.6.

beneficiary can determine whether there has been a loss. *See Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1344-51 (Fed. Cir. 2004).[9] A beneficiary cannot determine whether a loss occurred unless it is furnished all the information necessary to determine whether the trust assets have been managed properly and in accordance with applicable legal requirements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

---

[9] *See also, e.g.*, Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of Oct. 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of Sept. 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321.

Respectfully submitted,

STEVEN D. GORDON
Counsel of Record
SHENAN R. ATCITTY
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Respondent

NOVEMBER 2010

REPLY BRIEF

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. The Federal Circuit's decision is fundamentally flawed 2
B. The question presented warrants immediate review 5

TABLE OF AUTHORITIES

Cases:

Cheney v. *United States Dist. Ct.*, 542 U.S. 367 (2004) ... 10
Cheney, In re, 406 F.3d 723 (D.C. Cir. 2005) 10
Cobell v. *Norton*:
212 F.R.D. 24 (D.D.C. 2002) 9
213 F.R.D. 48 (D.D.C. 2003) 9
334 F.3d 1128 (D.C. Cir. 2003) 9
Cramer v. *United States*, 261 U.S. 219 (1923) 4
Department of the Interior v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) 5
Gasperini v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996) 8
Mohawk Indus., Inc. v. *Carpenter*, 130 S. Ct. 599 (2009) 7
Morton v. *Ruiz*, 415 U.S. 199 (1974) 4
Nevada v. *United States*, 463 U.S. 110 (1983) 4
Osage Nation v. *United States*, 66 Fed. Cl. 244 (2005) 8
Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 10
Swidler & Berlin v. *United States*, 524 U.S. 399 (1998) 4
United States v. *Candelaria*, 271 U.S. 432 (1926) 3
United States v. *Mendoza*, 464 U.S. 154 (1984) 9

Cases—Continued: Page

United States v. *Minnesota*, 270 U.S. 181 (1926) 3
United States v. *Mitchell*, 463 U.S. 206 (1983) 4
United States v. *Navajo Nation*:
537 U.S. 488 (2003) 3
129 S. Ct. 1547 (2009) 3, 4

Statutes:

Freedom of Information Act, 5 U.S.C. 552 *et seq.* 5, 9
28 U.S.C. 1292(b) 8
28 U.S.C. 1292(d)(2) 8

Miscellaneous:

Felix S. Cohen, *Handbook of Federal Indian Law* (2005) 4
Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 5
Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Legal Ethics 163 (2007) 6

In the Supreme Court of the United States

No. 10-382

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

For the first time in the history of litigation between Indians and the United States, a court of appeals has held that the United States must disclose to an Indian tribe confidential communications between the government and its attorneys implicating the administration of statutes pertaining to tribal trust property. That holding, which abrogates the government's attorney-client privilege by importing rules governing private trustees at common law, cannot be reconciled with this Court's longstanding precedents distinguishing the United States, as a sovereign, from a common-law trustee or with the established understanding of the role of government lawyers representing the United States in Indian affairs. As the certiorari petition explains, this Court's review is needed to protect the government's interests in the more than 90 pending tribal trust cases and to avoid undermining the ability of agency personnel to solicit, and government attorneys to provide, legal ad-

vice—to the detriment of the government, and of tribes and individual Indians generally.

A. The Federal Circuit's Decision Is Fundamentally Flawed

As explained in the petition, the Federal Circuit erred in concluding that the Tribe was the "real client" of government attorneys (Pet. 12-20) and that the government had a broad common-law trust duty to disclose information, including attorney-client privileged information, to Indian tribes (Pet. 21-30). The Tribe essentially reads the former issue out of the Federal Circuit's opinion and gives short shrift to this Court's precedents on the latter issue.

1. The Federal Circuit ignored the Executive Branch's longstanding view of who constitutes the "real client" in government litigation involving Indian interests, and it incorrectly deemed irrelevant the source of payment of the government's legal advice for purposes of identifying the client in the tribal trust context. Pet. 14-20. The Tribe attempts to mask those serious flaws by arguing that no "formal" attorney-client relationship need be found for a tribe to be the "real client." Opp. 15-17. That tactic does not solve the significant problems posed by the Federal Circuit's decision.

As explained in the petition (Pet. 12-14, 18-20), the Federal Circuit's "real client" rationale cannot be squared with: (1) the Court's established precedents underscoring the distinct sovereign function of the United States in the Indian trust setting, or (2) the fact that government attorneys are paid from the Treasury to further those sovereign functions (which, contrary to the Tribe's contention, are not solely "to aid the trust beneficiary," Opp. 17). And taking the Tribe's argument to its logical conclusion essentially eviscerates any distinction between the Federal Circuit's "real client" rationale and its "common-law duty to dis-

close" rationale (discussed next), since the Tribe's explanation of the former is based on the "policy of full disclosure in the trustee-beneficiary relationship." Opp. 16.

2. The Tribe contends that the government is subject to a general common-law trust duty to disclose all material information—including attorney-client privileged communications—to a tribe. Opp. 17-23. The Tribe concedes (Opp. 17) that the government owns outright all records concerning its administration of statutes affecting Indian property, and the United States exercises complete control over those records pursuant to federal statutes and regulations governing their maintenance and control. There is no common-law right of access to such material. See Pet. 25-27.

The Tribe all but ignores (Opp. 15 n.3) the Court's decisions in *United States* v. *Candelaria*, 271 U.S. 432 (1926), and *United States* v. *Minnesota*, 270 U.S. 181 (1926), establishing that the government's administration of laws concerning tribal trust property is a distinctly sovereign function. Pet. 13-14. Even more striking is the Tribe's passing treatment (Opp. 18-19) of *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), and *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009)—two decisions of this Court that the Federal Circuit did not even mention. The Tribe's discussion is limited to the contention that the *Navajo Nation* decisions involve jurisdictional prerequisites that "have no place in the analysis here." Opp. 19. Even that cramped interpretation cannot help the Tribe. Although the *Navajo Nation* decisions concern jurisdiction, the limited role that the common law played in that inquiry (Pet. 21-23) vitiates the very premise of the Federal Circuit's decision—*i.e.*, that the United States is a "general trustee" that owes a "common law duty to disclose information" to Indian tribes. Pet. App. 21a, 22a. Given that this Court twice reversed the

Federal Circuit for erroneously relying on a "general trust relationship," the Federal Circuit's decision below repeating that error for a third time commands this Court's review.[1]

The Tribe's citation (Opp. 14, 19-20) to plainly distinguishable pre-*Navajo Nation* decisions[2] cannot avoid the Court's recent instruction that, absent a clear statutory duty, "common-law trust principles [do not] matter" in this context. *Navajo Nation*, 129 S. Ct. at 1558. The Tribe's resort to the *Handbook of Federal Indian Law* is no more availing (Opp. 13): the treatise refers to the duties owed Indian tribes by the government as those "guaranteed by treaty and federal statute," not a body of general common law. Felix S. Cohen, *Handbook of Federal Indian Law* § 14.02[2][d], at 912 (2005).

Finally, contrary to the Tribe's contention (Opp. 21-22), the government has never argued that common-law trust

---

[1] The Tribe reads *Nevada* v. *United States*, 463 U.S. 110 (1983), in an exceedingly narrow fashion and argues that even where the government does consider a "specific competing interest," the "rationale for the fiduciary exception would not be undermined." Opp. 14-15 n.2. As explained in our petition (Pet. 31-32), the Federal Circuit's reservation of that question "introduces substantial uncertainty into the privilege's application," *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998), and the Tribe's argument only exacerbates that uncertainty. Moreover, the Tribe ignores the actual competing interest exemplified by one of the documents at issue. See Pet. 29; Pet. App. 74a (Doc. No. 37).

[2] See Pet. 24 (discussing *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983), as establishing the necessity of statutes and regulations to "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities"); *Morton* v. *Ruiz*, 415 U.S. 199, 205 n.7, 237 (1974) (interpreting Snyder Act, 25 U.S.C. 13, not imposing freestanding common-law trust duties); *Cramer* v. *United States*, 261 U.S. 219, 230 (1923) (relying on property law rules rather than imposing any general fiduciary duty).

duties, *independent of statutory or regulatory requirements*, apply to the government's relationship with tribes. In *Department of the Interior* v. *Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the government, arguing that correspondence between a tribe and the government was exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.*, cited one aspect of "traditional trust doctrine"—a trustee's duty of confidentiality when disclosure is harmful to a beneficiary's interests (Gov't Br. 17, 34, 36, *Klamath*, *supra* (No. 99-1871))—in support of its argument that "compelled release * * * would impair the [government's] performance of the functions assigned to it." *Id.* at 36. The "functions assigned to" the government were those assigned *by statute and agency directive* (see *id.* at 5-7)—including a requirement that the government deem information received from tribes "confidential * * * if disclosure would negatively impact upon a trust resource," *id.* at 7. By contrast, as explained in the petition (Pet. 25-27), no such statutes or agency directives exist to support the disclosure obligation that the Tribe seeks to impose here.

B. The Question Presented Warrants Immediate Review

1. The Tribe is wrong in contending (Opp. 6-10) that review should be denied because this case is in an interlocutory posture.

a. Although this Court generally awaits a final judgment of the court of appeals before granting review, that practice is by no means absolute. The Court has done so on numerous occasions in various contexts—especially where, as here, the case presents an important issue of law with immediate consequences for the petitioner. See Eugene Gressman et al., *Supreme Court Practice* 281-283 (9th ed. 2007) (collecting cases).

As explained in the petition (Pet. 30-33), there are compelling reasons here for the Court to grant review in this case now notwithstanding its interlocutory posture. The Federal Circuit's decision will be binding precedent in all pending and future cases in the Court of Federal Claims (CFC), where the majority of tribal trust claims have been brought. Pet. App. 126a-138a. That ruling may not only increase the government's exposure in these cases seeking billions of dollars (Pet. 30), but, more urgently, it threatens to undermine the day-to-day administration by agency personnel of the statutory and regulatory duties governing those trusts—both by chilling their seeking of legal advice and by creating ethical concerns for government attorneys who advise those personnel (Pet. 31-33).

The Tribe has offered no persuasive rebuttal to those significant practical consequences. In response to the chilling concern—one recognized by this Court in other contexts and confirmed by the agencies directly affected by the Federal Circuit's decision in this context (Pet. 31-32) —the Tribe relies on a law-journal note to argue that the attorney-client privilege is "already uncertain, due to various open government provisions and political and media pressures." Opp. 10 (quoting Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Legal Ethics 163, 198 (2007) (*Survey Note*)). The note is based on anecdotal interviews with state and municipal (not federal) government lawyers (*Survey Note* 181 n.112), and, in any event, the attorney-client privilege would not merely be "uncertain" without this Court's review of the Federal Circuit's decision: it would be *inapplicable* in the context of the United States' administration of statues governing funds held in trust for Indians.

With respect to the professional responsibility concerns, the Tribe offers no direct response at all. Instead, as noted above (p. 2, *supra*), the Tribe attempts to mitigate the import of the Federal Circuit's determination that the Tribe is the "real client" of government attorneys in the tribal trust context by arguing that the decision does not turn on the existence of a "formal" attorney-client relationship. Opp. 16. But that is little comfort to government attorneys who are regulated by the bars of the various States, not all of which might share the Tribe's current view of the Federal Circuit's decision. Although the Tribe asserts that there is no reason why the chilling effect on the government would be different than that on any private trustee (Opp. 9-10), the Tribe fails to acknowledge that private trustees are differently situated because, unlike the government, they can employ other counsel. See Pet. 33.

b. The Tribe's reliance on the Court's recent decision in *Mohawk Industries, Inc.* v. *Carpenter*, 130 S. Ct. 599 (2009), is misplaced. As an initial matter, the government's position in this case comports fully with its position in *Mohawk*. The government argued in *Mohawk* that ordinary rulings requiring production of material over which a party asserts the attorney-client privilege—a potentially large class of orders—should not be appealable as of right under the "collateral order" doctrine. The government emphasized, however, that mandamus remained an available remedy for reviewing such orders in extraordinary circumstances. Gov't Br. 6, 15, 26, 27, *Mohawk*, *supra* (No. 08-678). Consistent with that position, as endorsed by the Court's decision (*Mohawk*, 130 S. Ct. at 607-608), the government sought mandamus review of the CFC's order in this case because of the need for "promptly correcting serious errors" (*id.* at 608) as to the applicability of the

attorney-client privilege in the Indian trust context—a legal issue of broad and critical importance. Pet. 31-33.[3]

Because the Federal Circuit's decision is now controlling law in the CFC on the recurring question presented here, the Tribe's suggestion (Opp. 12) that post-judgment appeal would suffice in this case (or any other CFC case) is plainly wrong. Only the Federal Circuit considering the issue *en banc* could reverse the decision below, and it has already refused to do so. Pet. App. 91a.

2. The Tribe argues that the lack of a conflict among the lower courts on the question presented warrants denial of certiorari. But it is precisely the novelty of the Federal Circuit's decision and its anticipated disruption of the government's settled practices that counsel in favor of immediate review. Pet. 7, 9-10.

Contrary to the Tribe's contention, three prior trial court decisions addressing the applicability of a fiduciary exception in Indian trust cases—two of which were issued by the same CFC judge[4]—do not constitute a "uniform[]" body of case law on the issue (Opp. 7), much less create any "settled expectation" (Opp. 8). Trial court decisions have no precedential effect, even upon the judges of the same court. See *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415,

---

[3] The Tribe contends (Opp. 10) that the United States could have sought interlocutory review of the CFC's ruling by requesting certification under 28 U.S.C. 1292(b) (actually, for appeals to the Federal Circuit, 28 U.S.C. 1292(d)(2)). That contention is of questionable relevance, given that the Federal Circuit addressed the government's claim on the merits in the mandamus proceeding. It is also incorrect: Section 1292(d)(2) requires showing that resolution of the question presented would "materially advance the ultimate termination of the litigation"—something neither party has contended in this case.

[4] Pet. App. 85a-90a; *Osage Nation* v. *United States*, 66 Fed. Cl. 244 (2005).

430 n.10 (1996). In any event, any "settled expectation" is undercut by other decisions recognizing the attorney-client privilege when asserted as a basis for withholding documents requested by tribes under FOIA. See Pet. 11 n.6 (citing cases).

Nor is the suitability of this case for certiorari diminished, as the Tribe contends (Opp. 7-8), by the fact that the United States voluntarily dismissed its appeal of a similar issue to the D.C. Circuit in the other case the Tribe cites, *Cobell* v. *Norton*, 212 F.R.D. 24 (D.D.C. 2002). In considering whether to pursue appeal, the United States is "apt to differ from that of a private litigant * * * who generally does not forgo an appeal if he believes that he can prevail." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). In *Cobell*, the United States had case-specific reasons—independent of the issue's merits or importance—for dismissing its appeal of the district court's decision. In that case, the attorney-client privilege issue arose in a deposition being overseen by a special master-monitor, who had the power to issue rulings on objections, terminate the deposition, and recommend sanctions. 212 F.R.D. at 28; *Cobell* v. *Norton*, 213 F.R.D. 48, 57-60 (D.D.C. 2003). Although the Solicitor General authorized the United States to seek appellate review of the district court's order, he later authorized the government to withdraw its appeal after the D.C. Circuit granted the government's request to remove the special master-monitor—thereby resolving a significant source of the government's immediate concerns in that case. See *Cobell* v. *Norton*, 334 F.3d 1128 (2003) (invalidating appointment of special master-monitor).

Relatedly, the Tribe contends that "[n]o emergency has arisen" in the seven years since the government dismissed its "fiduciary exception" appeal in *Cobell* so as to warrant certiorari. Opp. 8-9. The overwhelming majority (82 of 95)

of pending tribal trust cases, however, were filed after 2003. Pet. App. 126a-138a. And, of course, the fact that the Federal Circuit's decision below constitutes a decision binding on all CFC cases dramatically increases the government's need for this Court's review. Pet. 30.

3. The Tribe correctly notes that mandamus is an extraordinary remedy (Opp. 11), but its requirements are "not insuperable" and certainly do not preclude this Court's review here. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 381 (2004). This Court has sanctioned federal appellate courts to use mandamus to address novel questions of pure law in the discovery context. See, *e.g.*, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110-112 (1964) (order compelling mental and physical examinations); see also *Cheney*, 542 U.S. at 381. Even if the Court ultimately declined to direct the issuance of mandamus relief, its explication of the governing principles could prompt the court of appeals to reconsider its decision. Cf. *In re Cheney*, 406 F.3d 723, 731 (D.C. Cir. 2005).

The Tribe's contention that the United States seeks correction of a "factbound determination" is also incorrect. Opp. 5. A single, purely legal issue is presented: whether the attorney-client privilege entitles the government to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of laws concerning property held in trust for the tribe. Pet. I. Resolution of that question does not turn on the applicability of the privilege to any particular documents; indeed, the CFC concluded that at least some of the documents at issue would otherwise be protected by the privilege if a fiduciary exception did not apply. Pet. App. 50a. And the United States is not challenging the CFC's fact-based determinations regarding whether the documents at issue concern trust management

and therefore fall within the scope of the exception the court fashioned. *Id.* at 50a-51a, 53a-54a.

* * * * *

This Court's review of the Federal Circuit's fundamentally flawed decision depriving the government of its attorney-client privilege is critical not only in light of the 90 other pending Indian trust cases and any future cases in the CFC, but also to ensure that agency personnel seek and receive the legal advice they need for proper administration of their statutory duties.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

DECEMBER 2010

JOINT APPENDIX

FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

NEAL KUMAR KATYAL
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record
for Petitioner

STEVEN D. GORDON
Holland & Knight, LLP
2099 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Steven.Gordon@hklaw.com
(212) 955-3000

Counsel of Record
for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 20, 2010
CERTIORARI GRANTED: JAN. 7, 2011

TABLE OF CONTENTS

	Page
United States Court of Federal Claims docket entries	1
United States Court of Appeals for the Federal Circuit docket entries	21

UNITED STATES COURT OF FEDERAL CLAIMS

No. 1:02-cv-00025-FMA

JICARILLA APACHE NATION

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/8/02	1	COMPLAINT, FILING FEE $150, RECEIPT #053033. Answer due on 3/11/02. (FE) (Entered: 01/09/2002)
		* * * * *
8/26/02	12	FIRST AMENDED COMPLAINT by JICARILLA (Answer due 9/13/02) amending [1-1] complaint. Service: 8/26/02. (FE) Modified on 09/11/2002 (Entered: 08/29/2002)
9/11/02	13	ANSWER by USA to amended complaint. (JT) (Entered: 09/16/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
12/13/02	20	ORDER staying case until further notice; REFERRING CASE to ADR; and directing parties to file a joint status report on May 16, 2003, and every six months thereafter. Case referred to Judge Eric G. Bruggink for ADR proceedings. Signed by Judge Francis M. Allegra. (dls) (Entered: 01/09/2004)
		* * * * *
4/19/04	68	JOINT STATUS REPORT REGARDING DOCUMENT INDEXING AND RELATED ISSUES by all parties. (lld,) (Entered: 04/21/2004)
4/19/04	69	CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER. Signed by Judge Francis M. Allegra, (lld,) (Entered: 04/21/2004)
		* * * * *
5/13/08	142	MOTION to Vacate *Stay of Proceedings (Court ordered on Dec. 13, 2002)*, filed by JICARILLA APACHE NATION.

DATE	DOCKET NUMBER	PROCEEDINGS
		Response due by 5/30/2008. (Gordon, Steven) (Entered: 05/13/2008)
		* * * * *
6/16/08	147	ORDER Removing Case from the ADR process. Judge Senior Judge Eric G. Bruggink no longer assigned to the case. Signed by Senior Judge Eric G. Bruggink. (mkb) (Entered: 06/16/2008)
6/25/08	148	JOINT PRELIMINARY STATUS REPORT. (Rodrigues, Robert) (Entered: 06/25/2008)
7/1/08	149	ORDER granting 142 Motion to Vacate and restoring this case to the active docket. Signed by Judge Francis M. Allegra. (si) (Entered: 07/01/2008)
		* * * * *
7/28/08	151	DISCOVERY SCHEDULING ORDER: **All Fact Discovery due by 3/31/2009. Parties shall Complete Expert Depositions by 7/30/2009. Joint Status Re-**

DATE	DOCKET NUMBER	PROCEEDINGS
		port due by 8/14/2009. Signed by Judge Francis M. Allegra. (si) (Entered: 07/28/2008)
10/7/08	152	ORDER confirming the first phase of this case, in which discovery is now ongoing, will be limited to fiscal claims relating to defendant's management of certain Jicarilla trust accounts from July 1, 1972, through September 30, 1992. Signed by Judge Francis M. Allegra. (si) (Entered: 10/07/2008)
11/25/08	153	MOTION to Compel *Plaintiff's Motion to Compel Production of Documents*, filed by JICARILLA APACHE NATION. **Response dne by 12/12/2008.** (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Gordon, Steven) (Entered: 11/25/2008)
		* * * * *
12/19/08	156	RESPONSE to 153 MOTION to Compel *Plaintiffs Motion to Compel Production of Documents*, filed by USA. **Reply**

DATE	DOCKET NUMBER	PROCEEDINGS
		due by 1/5/2009. (Attachments: # 1 Exhibit 1 - Privilege Log) (Sato, Ayako) (Entered: 12/19/2008)
12/22/08	157	ORDER. **Submission to chambers for en camera review due on or before 11/6/2009.** Signed by Judge Francis M. Allegra. (Allegra, Francis) (Entered: 12/22/2008)
1/5/09	158	REPLY to Response to Motion re 153 MOTION to Compel *Plaintiffs Motion to Compel Production of Documents Plaintiffs Reply In Support of Motion to Compel Production of Documents,* filed by JICARILLA APACHE NATION. (Attachments: # 1 Exhibit 1-5)(Gordon, Steven) (Entered: 01/05/2009)
1/16/09	159	NOTICE; filed by USA re 157 Order (Attachments: # 1 Exhibit I: Privilege log filed on December 19, 2008, # 2 Exhibit 2: Revised privilege log) (Sato, Ayako) (Entered: 01/16/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/17/09	172	ORDER Setting Hearing on Motions 160 MOTION for Protective Order, 170 MOTION to Compel. The amici, Pueblo of Laguna and Navajo Nation, may participate in the argument on plaintiffs motion for a protective order, and shall file a notice on or before April 9, 2009, indicating whether they intend to participate, **Oral Argument set for 4/16/2009 02:00 PM in National Courts Building before Judge Francis M. Allegra.** Signed by Judge Francis M. Allegra. (si) (Entered: 03/17/2009)
		* * * * *
3/18/09	174	SCHEDULING ORDER: Oral Argument set for 4/16/2009 at 2:00 p.m. (EDT) in National Courts Building before Judge Francis M. Allegra. To ensure that briefing on defendant's motion to compel is completed in advance of the argument:

DATE	DOCKET NUMBER	PROCEEDINGS
		Plaintiffs Response due by 4/3/2009. Defendant's Reply due by 4/17/2009. Signed by Judge Francis M. Allegra. (Si) (Entered: 03/18/2009
		* * * * *
3/31/09	178	Joint MOTION for Extension of Time, until 45 days, to Complete Discovery *for the Purpose of Completing Depositions*, filed by USA. **Response due by 4/17/2009.** (Attachments: # 1 Text of Proposed Order) (Marvin, Barbara) (Entered: 03/31/2009)
3/31/09	179	MOTION for Extension of Time, until 365 days, to Complete Discovery, filed by USA. **Response due by 4/17/2009.** (Attachments: # 1 Text of Proposed Order) (Marvin, Barbara) (Entered: 03/31/2009)
4/1/09	180	ORDER granting 178 Motion for Extension of Time to Complete Discovery. Defendant's motion to further extend the discovery deadlines will be dis-

DATE	DOCKET NUMBER	PROCEEDINGS
		cussed at oral argument on April 16, 2009. **Fact Discovery due by 5/15/2009.** Signed by Judge Francis M. Allegra. (si) (jt1). (Entered: 04/01/2009)
		* * * * *
4/16/09		Minute Entry for proceeding held in Washington, DC on 4/16/2009, ended on 4/16/2009, before Judge Francis M. Allegra: Oral Argument. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.) (si) (Entered: 04/16/2009)
		* * * * *
4/24/09	194	Notice Of Filing Of Official Transcript for proceedings held on April 16, 2009 in Washington, DC. (dwl) Modified on

DATE	DOCKET NUMBER	PROCEEDINGS
		6/25/2009 (jtl) See Order of 6/25/09 Striking this document. (Entered: 04/24/2009)
4/24/09	195	TRANSCRIPT of Proceedings (pages 1-138) held on April 16,2009 before Judge Francis M. Allegra. Procedures Re: Electronic Transcripts and Redactions. For copy, contact Heritage Court Reporting, (202) 628-4888. Forms to Request Transcripts. Notice of Intent to Redact due 5/1/2009. Redacted Transcript Deadline set for 5/26/2009. Release of Transcript Restriction set for 7/23/2009. (dwl) Modified on 6/25/2009 See Order of 6/25/09 Striking this document(jtl). (Entered: 04/24/2009)
		* * * * *
5/4/09	199	NOTICE, filed by USA re 157 Order (Attachments: # 1 Exhibit 1)(Sato, Ayako) (Entered: 05/04/2009)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/27/09	204	ORDER directing defendant to provide for en camera review a copy of its May 1991 and August 1996 contracts. **Notice of Compliance due by 6/12/2009.** Signed by Judge Francis M. Allegra. (si) (Entered: 05/27/2009)
6/12/09	205	NOTICE, filed by USA re 204 Order *of Filing Under Seal for In Camera Review* (Sato, Ayako) (Entered: 06/12/2009)
		* * * * *
6/18/09	207	Unopposed MOTION to Correct Transcript re 194 Notice Of Filing Of Official Transcript, filed by JICARILLA APACHE NATION, PUEBLO OF LAGUNA, NAVAJO NATION. **Response due by 7/612009.** (Attachments: # 1 Exhibit Clean corrected transcript, # 2. Exhibit Redline corrected transcript) (Rey-Bear, Daniel) (Entered: 06/18/2009)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/19/09	209	JOINT STATUS REPORT *Regarding Pre-Trial Schedule*, filed by JICARILLA APACHE NATION. (Attachments: # 1 Exhibit 1 through 3) (Gordon Steven) (Entered: 06/19/2009)
		* * * * *
6/25/09		ORDER Striking 194 Notice Of Filing Of Official Transcript and striking 195 Transcript, and denying, as moot 207 Unopposed MOTION to Correct Transcript. Signed by Judge Francis M. Allegra. (si) (Entered: 06/25/2009)
7/2/09	211	**SEALED**ORDER granting in part and denying in part 153 Motion to Compel; granting in part and denying in part 160 Motion for Protective Order; denying 170 Motion to Compel; temporarily denying 179 Motion for Extension of Time to Complete Discovery(Status Report due by 7/15/2009) Signed by Judge Judge Francis M. Allegra. (Allegra, Francis) (jtl). Modified on 7/10/2009 -

DATE	DOCKET NUMBER	PROCEEDINGS
		corrected pdf (jtl). (Entered: 07/02/2009)
7/2/09	212	ORDER Signed by Judge Francis M. Allegra. (Allegra, Francis) (Entered: 07/02/2009)
7/9/09	213	MOTION to Stay in part, July 3, 2009 Order (Docket No. 211), filed by USA. **Response due by 7/27/2009.** (Terrell, Stephen) (Entered: 07/09/2009)
7/10/09	214	RESPONSE to 213 MOTION to Stay in part, July 3, 2009 Order (Docket No. 211) *Opposition to Defendant's Motion to Stay, In Part, The July 3, 2009 Order (Docket Number 211)*, filed by JICARILLA APACHE NATION. **Reply due by 7/24/2009.** (Gordon, Steven) (Entered: 07/10/2009)
7/10/09	215	ORDER granting in part and denying in part *213* Motion to Stay (treated as a motion for enlargement). **Documents shall be produced on or before 8/10/2009. Joint status report due all or before 8/17/2009. All**

DATE	DOCKET NUMBER	PROCEEDINGS
		other deadlines remain in effect. Signed by Judge Francis M. Allegra. (Allegra, Francis) (Entered: 07/1012009)
7/10/09		Set Deadlines/Hearings: re: 215 Order on Motion to Stay, Joint Status Report due by 8/17/2009. (jtl) (Entered: 07/13/2009)
7/21/09	216	PUBLISHED OPINION: Granting, in part, and denying, in part, plaintiffs motion for a protective order and denying defendant's motion to compel. Signed by Judge Francis M. Allegra. (si) (Entered: 07/21/2009)
7/27/09	217	MOTION for Hearing re 212 Order *Plaintiff's Request for Hearing or Status' Conference Regarding Pre-trial Schedule*, filed by JICARILLA APACHE NATION. **Response due by 8/13/2009.** (Gordon, Steven) (Entered: 07/27/2009)
7/28/09	218	ORDER denying 217 Motion for Hearing. The parties shall comply with the deadlines es-

DATE	DOCKET NUMBER	PROCEEDINGS
		tablished in the July 10, 2009, order. Signed by Judge Francis M. Allegra. (si) (Entered: 07/28/2009)
		* * * * *
7/31/09	220	MOTION to Stay Order (Docket Nos. 211 and 216) *Pending Disposition of Mandamus Action*, filed by USA. **Response due by 8/17/2009.** (Terrell, Stephen) (Entered: 07/31/2009)
8/3/09	221	ORDER: Plaintiff shall file a response to defendants motion to stay. **Response due by 8/512009.** Signed by Judge Francis M. Allegra. (si) (Entered: 08/03/2009)
8/5/09	222	ORDER all further briefing on defendants motion to stay is hereby STAYED. In addition, the courts order requiring the parties to file a joint status report by August 17, 2009, is also hereby STAYED until further order. Signed by Judge Fran-

DATE	DOCKET NUMBER	PROCEEDINGS
		cis M. Allegra. (si) (Entered: 08/05/2009)
		* * * * *
1/4/10	225	NOTICE re: On petition for writ of mandamus to the United States Court of Federal Claims - CAFC Miscellaneous docket number 908. Service: 1/4/2010. (hwl,) (Entered: 01/04/2010)
1/4/10	226	ORDER: On December 30, 2009, the Federal Circuit denied defendants petition for a writ of mandamus in this case. The Federal Circuits decision also lifted the temporary stay on this courts July 2, 2009, order of production. **Defendant shall produce to plaintiff all the documents (or the designated portions thereof) listed in part IV(1)(a) of the courts July 2, 2009, order by 1/13/2010.** Signed by Judge Francis M. Allegra. (si) (Entered: 01/04/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
1/4/10	227	STATUS REPORT ORDER. **Joint Status Report due by 1/25/2010.** Signed by Judge Francis M. Allegra. (si) (Entered: 01/04/2010)
1/8/10	228	MOTION to Stay Order (Docket No. 226), filed by USA. **Response due by 1/25/2010.** (Attachments: # 1 Appendix Docket No. 220) (Terrell, Stephen) (Entered: 01/08/2010)
1/8/10	229	ORDER: Today, defendant filed a motion to stay this courts January 4,2010, order requiring production of those documents described in part IV(1)(a) of this courts July 2, 2009 order (part IV(1)(a) documents). To allow for briefing on defendants motion and further to prepare the court for its review: **The deadline for defendants production of the part IV(1)(a) documents is hereby extended to and including 2/1/2010. Defendant shall file a memorandum by 1/19/2010. Plaintiff shall file it response to Defendant's memorandum by**

DATE	DOCKET NUMBER	PROCEEDINGS
		1/26/2010. The courts January 4, 2010, order requiring the parties to tile a joint status report on or before January 25, 2010, is hereby stayed until further order. Signed by Judge Francis M. Allegra. (si) (Entered: 01/08/2010)
1/8/10		Set/Reset Deadlines: Defendant's Memorandum due by 1/19/2010; Plaintiffs response(s) due by 1/26/2010; and deadline for Defendant's production of the part IV(1)(a) documents due by 2/1/2010.(jtl) (Entered: 01/11/2010)
1/19/10	230	MEMORANDUM re: 228 Motion to Stay, 229 Order,,,, filed by USA. (Terrell, Stephen) (Entered: 01/19/2010)
1/25/10	231	RESPONSE to 228 MOTION to Stay Order (Docket No. 226) *Plaintiffs Opposition To Defendant's Motion For Stay Of Order Pending Further Appellate Relief,* filed by JICARILLA APACHE NATION. **Reply due**

DATE	DOCKET NUMBER	PROCEEDINGS
		by 2/4/2010. (Gordon, Steven) (Entered: 01/25/2010)
1/26/10	232	RESPONSE to 228 Motion to Stay *and Opposing Waiver,* filed by NAVAJO NATION, PUEBLO OF LAGUNA. (Rey-Bear, Daniel) (Entered: 01/26/2010)
1/28/10	233	ORDER extending the production deadline of the part IV(1)(a) documents. **Documents Production due by 2/5/2010.** Signed by Judge Francis M. Allegra. (si) (Entered: 01/28/2010)
2/1/10	234	ERRATA: Please correct clerical error in the opinion filed on July 21, 2009. Signed by Judge Francis M. Allegra. (si) (Entered: 02/01/2010)
2/1/10	235	PUBLISHED OPINION denying 228 Motion to Stay (defendant shall produce to plaintiff any documents subject to this court's production order that have not yet been produced by 2/17/2010). Signed by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Francis M. Allegra. (si) (Entered: 02/01/2010)
2/10/10	236	ORDER re 235 Order on Motion to Stay, Published Opinion. **Modifying Production Deadline—Notice of Compliance due by 2/22/2010.** Signed by Judge Francis M. Allegra. (Allegra, Francis) (Entered: 02/10/2010)
2/18/10	237	Unopposed MOTION for Protective Order, filed by USA. **Response due by 3/8/2010.** (Attachments: # 1 Exhibit 1, # 2 Text of Proposed Order) (Terrell, Stephen) (Entered: 02/18/2010)
2/19/10		ORDER **No later than 3:00 pm, TODAY, 2/19/2010, plaintiff shall file any objections it has to the draft order proposed by defendant in its Motion for Protective Order 237 . Any such objections shall be accompanied by specific red lined edits to tbe draft. It is the court's intention to issue a protective order as soon as possible after this 3:00 pm deadline.** Signed by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Francis M. Allegra. (Allegra, Francis) (Entered: 02/19/2010)
2/19/10	238	RESPONSE to 237 Unopposed MOTION for Protective Order, filed by JICARILLA APACHE NATION. **Reply due by 3/1/2010.** (Gordon, Steven) (Entered: 02/19/2010)
2/19/10	239	PROTECTIVE ORDER. Signed by Judge Francis M. Allegra. (si) (Entered: 02/19/2010)
		* * * * *
2/22/10	241	NOTICE, filed by USA *Defendant's Notice of Compliance* (Sato, Ayako) (Entered: 02/22/2010)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2009-M908

IN RE UNITED STATES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
[MOTIONS:]		
4/13/10		**MOTION**: Entry 31 :by Amici - Amici Navajo Nation's and Pueblo of Laguna's Unopposed Motion for Leave To File Amicus Brief Opposing Combined Petition for Rehearing. **SERVICE**: by Mail on 4/13/2010
		ACTION: Entry 32 :Motion granted. Filed: 4/15/2010
2/3/10		**MOTION**: Entry 26 :by Petitioner - The United States' Motion for 45-Day Extension Of Time To File A Rehearing Petition **SERVICE** : by Hand on 2/312010

DATE	DOCKET NUMBER	PROCEEDINGS
		REPLY 1: 2/4/2010, Entry #27
		REPLY 2: 2/16/2010, Entry #28
		ACTION: Entry 29 :Granted in part. Petitioner may file a petition for rehearing by March 12, 2010. Filed 3/8/2010
8/25/09		**MOTION**: Entry 18 :by Amicus - Unopposed motion for leave to file shortened Amicus Brief. SERVICE: by Mail on 8/24/2009
		ACTION: Entry 22 :Granted. The original motion for leave to file a brief amicus curiae is moot. Filed 12/30/2009
8/21/09		**MOTION**: Entry 16 :by Petitioner - Motion for leave to file a Reply in support of it's Petition for Mandamus with Reply attached. **SERVICE**: by Mail on 8/21/2009
		REPLY 1: 8/25/12009 , Entry #17
		ACTION: Entry 21 :Granted. Filed: 12/30/2009

DATE	DOCKET NUMBER	PROCEEDINGS
7/31/09		**MOTION**: Entry 4 :by Petitioner - Petition for Writ of Mandamus. **SERVICE**: by Court on 8/31/2009
		REPLY: 1: 8/12/2009 , Entry 7
		ACTION: Entry 23 :PRECEDENTIAL ORDER: Petition for writ of mandamus is denied. The temporary stay of the Court of Federal Claims order that required production is lifted. Filed: 12/30/2009
[OTHER ENTRIES:]		
1/7/10 [*sic*]	38	Notice from the Clerk of the/ Supreme Court of the United States indicating that the petition for writ of certiorari was granted on January 7, 2011. Justice Kagan took no part in the consideration or decision of this petition.
9/21/10	36	Notice from the Clerk of the Supreme Court of the United States indicating that a petition for writ of certiorari was filed on 9/20/10 and placed on the

DATE	DOCKET NUMBER	PROCEEDINGS
		docket as No. 10-382, United States v. Jicarilla Apache Nation
8/20/10	35	Notice from the Clerk of the Supreme Court of the United States of a further extension of time, to and including 9/19/2010, to file a petition for writ of certiorari.
7/17/10	34	Notice from the Clerk of the Supreme Court of the United States of an extension of time to and including 8/20/2010 to file a petition for writ of certiorari.
	33	Petition/En Banc Action : Denied/Denied on 4/22/10
		Response requested from : Respondent (Jicarilla Apache Nation (formerly Jicarilla Apache Tribe)). Response due: 3/30/2010. Response filed : 3/30/2010

DATE	DOCKET NUMBER	PROCEEDINGS
3/12/10	30	Petitioner [United States] - Combined Petition for Panel Rehearing and Rehearing En Banc. Mail Service- 3/12/2010: Filed 3/12/2010.
1/13/10	25	Errata to Precedential opinion issued on 12/30109. (Sent to parties) **SERVICE**: by Court on 1/13/2010
12/17/09	20	Official Caption revised to correct text in docket number. **SERVICE**: by Court on 12/17/2009 **DOC**: : In Re United States 2009-M908 (12.17.09 CAPTION).pdf
12/9/09	19	Petitioner, The United States', Citation of Supplemental Authority pursuant to Fed. R. App. P. 28(j). (sent to SSA)

DATE	DOCKET NUMBER	PROCEEDINGS
		SERVICE: by Mail on 12/9/2009
8/19/09	15	Respondent Jicarilla Apache Nation's Amended Certificate of Service to motion for leave to file response to Petition for a Writ Mandamus. The Honorable Francis M. Allerga was inadvertently Ommitted. Placed in file.
		SERVICE: by Mail on 8/19/2009
8/14/09	9	Entry of Appearance for Daniel I.S.J Rey-Bear as counsel on behalf of amici curiae, Navajo Nation and Pueblo of Laguna.
		SERVICE: by Mail on 8/12/2009
		DOC: : In re United States 2009-M908 (8.14.09 EOA REY-BEAR).PDF
8/14/09	8	Entry of Appearance for Alan R. Taradash as principal counsel on behalf of amici curiae, Navajo Nation and Pueblo of Laguna.

DATE	DOCKET NUMBER	PROCEEDINGS
		SERVICE: by Mail on 8/12/2009
		DOC: : In re United States 2009-M908 (8.14.09 EOA TARADASH).PDF
8/14/09	12	Brief for amici curiae Navajo Nation, et al.'s in support of the respondents and opposing mandamus petition. (sent to SSA)
		SERVICE: by Mail on 8/13/2009
8/14/09	11	Certificate of Interest for amici curiae, Navajo Nation and Pueblo of Laguna. [separate COI signed by each atty.]
		SERVICE: by Mail on 8/12/2009
		DOC: : In re United States 2009-M908 (8.14.09 COI NAVAJO NATION).PDF
8/14/09	10	Entry of Appearance for Donald H. Grove as counsel on behalf of amici curiae, Navajo Nation and Pueblo of Laguna.
		SERVICE: by Mail on 8/14/2009

DATE	DOCKET NUMBER	PROCEEDINGS
		DOC: : In re United States 2009-M908 (8.14.09 EOA GROVE).PDF
8/13/09	14	Certificate of interest for respondent Jicarilla Apache Nation.
		SERVICE: by Mail on 8/6/2009
		DOC: : In re United States 2009-M908 (8.13.09 COI JICARILLA APACHE NATION).PDF
8/13/09	13	Entry of Appearance for Steven D. Gordon as principal counsel on behalf of respondent, Jicarilla Apache Nation (formerly Jicarilla Apache Tribe).
		SERVICE: by Mail on 8/6/2009
		DOC: : In re United States 2009-M908 (8.13.09 EOA GORDON).PDF
8/4/09	6	Ordered: 1) Jicarilla Apache Nation directed to respond to petition wlin 10 calendar days. 2) Portions of CFC's orders requiring production of docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ments at issue temporarily stayed. (see order for details) By: Motions Panel. Judge: Prost.
		SERVICE: by Court on 8/4/2009
8/3/09	5	Opinion from the Claims Court filed under seal along with "Exhibit A" to the writ filed by the United States. (located in vault)
8/3/09	3	Entry of appearance for Brian C. Toth as principal counsel on behalf of the petitioner, United States.
		SERVICE: by Court on 8/3/2009
		DOC: : In re United States 2009-M908 (8.3.09 EOA TOTH).PDF
8/3/09	2	Official Caption.
		SERVICE: by Court on 8/3/2009
		DOC: : In re United States 2009-M908 (8.3.09 CAPTION).pdf

PETITIONER'S BRIEF

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

BRIAN C. TOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HILARY C. TOMPKINS
Solicitor
Department of the Interior
Washington, D.C. 20240

QUESTION PRESENTED

Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between government officials and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 7
Argument:
The Federal Circuit erred in abrogating the government's attorney-client privilege in matters concerning Indian property 11
A. The government, not the tribe, is the "real client" of government attorneys 13
1. This Court's precedents establish that the United States acts distinctly as a sovereign, not as a common-law trustee, in matters affecting Indian assets 13
2. Executive branch guidance makes clear that government attorneys represent the United States, not a particular Indian tribe, in tribal trust matters 16
3. The Federal Circuit's rule would present professional ethics problems and significant practical concerns 24
4. That government attorneys are paid from government funds, not tribal trust funds, reinforces the conclusion that the government is the client 28
B. The government does not have a common-law duty to disclose attorney-client privileged communications to Indian tribes 30
1. This Court's *Navajo Nation* decisions preclude the Federal Circuit's imposition of a freestanding common-law duty 31

Table of Contents—Continued: Page

2. No statute or regulation requires the United States to disclose to Indian tribes privileged communications between government decisionmakers and their attorneys 37
3. Requiring disclosure of attorney-client privileged communications, especially in light of the government's potentially competing obligations, would chill the rendering of critical legal advice 41
Conclusion 45
Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605 (1983) 39
Berger v. *United States*, 295 U.S. 78 (1935) 40
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 18
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 37
Coastal States Gas Corp. v. *Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980) 11, 12
Cobell v. *Norton* (D.C. Cir.):
240 F.3d 1081 (2001) 7
392 F.3d 461 (2004) 33
428 F.3d 1070 (2005), cert. dismissed, 130 S. Ct. 3497 (2010) 29, 33
Cobell v. *Salazar*, 573 F.3d 808 (D.C. Cir. 2009), cert. dismissed, 130 S. Ct. 3497 (2010) 29, 33

Cases—Continued: Page

Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009) 18
County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226 (1985) 36, 39
Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977) 37
Department of the Interior v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) 14
Gros Ventre Tribe v. *United States*, 469 F.3d 801 (9th Cir. 2006), cert. denied, 552 U.S. 824 (2007) 33
Hancock v. *Train*, 426 U.S. 167 (1976) 37
Heckman v. *United States*, 224 U.S. 413 (1912) 8, 14
Jaffee v. *Redmond*, 518 U.S. 1 (1996) 41
Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 37
Lindsey, In re, 158 F.3d 1263 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998) 11
Long Island Lighting Co., In re, 129 F.3d 268 (2d Cir. 1997) 27
Lyng v. *Payne*, 476 U.S. 926 (1986) 37
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 2, 15
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) .. 37
Mohawk Indus., Inc. v. *Carpenter*, 130 S. Ct. 599 (2009) 7
National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 20
Nevada v. *United States*, 463 U.S. 110 (1983) ..... *passim*

Cases—Continued: Page

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) 11, 12

Northern Cheyenne Tribe v. *Hollowbreast*, 425 U.S. 649 (1976) 20

Osage Nation and/or Tribe of Indians v. *United States*, 66 Fed. Cl. 244 (2005) 4

Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968) 26

Pyramid Lake Paiute Tribe v. *Morton*, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975) 26

Riggs Nat'l Bank v. *Zimmer*, 355 A.2d 709 (Del. Ch. 1976) 9, 28

Rincon Band of Mission Indians v. *Escondido Mut. Water Co.*, 459 F.2d 1082 (9th Cir. 1972) 23

Sekaquaptewa v. *MacDonald*, 619 F.2d 801 (9th Cir.), cert. denied, 449 U.S. 1010 (1980) 25

Shinnecock Indian Nation v. *Kempthorne*, 652 F. Supp. 2d 345 (E.D.N.Y. 2009) 12

Shoshone Tribe v. *United States*, 299 U.S. 476 (1937) ... 25

Skull Valley Band of Goshute Indians v. *Kempthorne*, No. 04-cv-00339, 2007 WL 915211 (D.D.C. Mar. 26, 2007) 12

South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 37

Stevens v. *Commissioner*, 452 F.2d 741 (9th Cir. 1971) .. 20

Tax Analysts v. *IRS*, 117 F.3d 607 (D.C. Cir. 1997) 12

Teleglobe Comme'ns Corp., In re, 493 F.3d 345 (3d Cir. 2007) 27

United States v. *Candelaria*, 271 U.S. 432 (1926) 8, 14, 15

Cases—Continued: Page

United States v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974) .. 20
United States v. *Mason*, 412 U.S. 391 (1973) 20
United States v. *Mett*, 178 F.3d 1058 (9th Cir. 1999) 42
United States v. *Minnesota*, 270 U.S. 181 (1926) 8, 14, 15
United States v. *Mitchell*:
445 U.S. 535 (1980) 34
463 U.S. 206 (1983) 32, 34
United States v. *Navajo Nation*:
537 U.S. 488 (2003) 9, 31, 32, 34
129 S. Ct. 1547 (2009) 9, 31, 32
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 34
United States v. *Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976) 20
Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 39, 41
Wachtel v. *Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) 28
Western Shoshone Legal Def. & Educ. Ass'n v. *United States*, 531 F.2d 495 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976) 25

Constitution, statutes, regulations and rules:

U.S. Const.:
Art. I, § 8, Cl. 3 (Property Clause) 37
Art. II, § 3 16
Art. IV, § 3, Cl. 2 37

Statutes, regulations and rules—Continued: Page

American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239:
25 U.S.C. 162a(d) 10, 35, 36
25 U.S.C. 4011 35
Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447:
30 U.S.C. 1715(a) 36
30 U.S.C. 1732(b)(2) 36
Federal Records Act of 1950, ch. 849, § 6(d), 64 Stat. 583 29
Freedom of Information Act, 5 U.S.C. 552(b)(5) 10, 12, 39
Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. I, 96 Stat. 1966:
§§ 2-6, 96 Stat. 1976-1978 (28 U.S.C. 2415 note) ... 36
§§ 3-6, 96 Stat. 1977-1978 37
§ 5(b), 96 Stat. 1978 ..... 10, 37
Indian General Allotment Act, 25 U.S.C. 348 (1976) 33
Indian Mining Leasing Act of 1938, 25 U.S.C. 396a *et seq.* 2
Indian Tucker Act, 28 U.S.C. 1505 2
Indian Reorganization Act, 25 U.S.C. 461 *et seq.*:
25 U.S.C. 465 25
Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524:
Div. B, Tit. II, 123 Stat. 569 28
Div. E, Tit. I, 123 Stat. 718 28

Statutes, regulations and rules—Continued: Page

5 U.S.C. 3106 26
10 U.S.C. 827 21
18 U.S.C. 205 21
18 U.S.C. 216(a)(2) 21
18 U.S.C. 3006A(g)(2)(A) 21
18 U.S.C. 3571(b)(3) 21
25 U.S.C. 81a 26
25 U.S.C. 81b 26
25 U.S.C. 161a(a) 2, 33
25 U.S.C. 162a(a) 2, 33
25 U.S.C. 175 ..... 20, 22, 23
25 U.S.C. 4011(a) 33
28 U.S.C. 516 16
28 U.S.C. 519 16
43 U.S.C. 1455 ..... 3, 16, 20
43 U.S.C. 1457 39
43 U.S.C. 1460 35
44 U.S.C. 2901(1) 29
44 U.S.C. 3301 29
Ho-Chunk Nation Code, Tit. 1, § 8 (2009), http://www.ho-chunknation.com/UserFiles/1HCC_Sec.8_Justice_2.3.09.pdf 26
Tohono O'odham Code, Tit. 20, Ch. 1 (1991), http://www.tole-nsn.org/docs/Title20Ch1.pdf 26
5 C.F.R. 2635.101(a) 16
25 C.F.R.:
Pt. 15:
Section 15.502 30

Regulations and rules—Continued: Page

Pt. 89:

Section 89.40 22

Section 89.41 26

Section 89.42(d) 22

Pt. 115:

Section 115.801 38

Section 115.802 38

Section 115.803 38

Section 115.1000(a) 38

Section 115.1000(a)(2) 9, 30

Pt. 151 25

Pt. 162:

Section 162.111 30

Pt. 166:

Section 166.1000 30

Pt. 1200:

Section 1200.40(a) 23

28 C.F.R. 50.15(a) 21

43 C.F.R. 20.501 16

Miscellaneous:

Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47 (1982) 19

George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees*:

(rev. 2d ed. 1980) 40

(3d ed. 2010) 38

Miscellaneous—Continued: Page

Confidentiality of the Att'y General's Communs in Counseling the President, 6 Op. Off. Legal Counsel 481 (1982) 11, 26

Federal Government's Relationship with American Indians: Hearings Before the Special Comm. on Investigations of the S. Select Comm. on Indian Affairs, 101st Cong., 1st Sess. Pt. 1 (1989) 20

Floyd L. France, *Recent Developments in Indian Litigation*, 13 Land & Nat. Resources Div. J. 73 (1975) 23, 34

H.R. 6106, 93d Cong., 1st Sess. (1973) 19

H.R. 6374, 93d Cong., 1st Sess. (1973) 19

H.R. 6494, 93d Cong., 1st Sess. (1973) 19

Letter from Lois J. Schiffer, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Geoffrey C. Hazard, Jr., Professor, Yale Law School & Charles W. Wolfram, Professor, Cornell Law School (June 16, 1994) 18

Model Rules of Prof'l Conduct (2007):

Rule 1.2 24

Rule 1.7 24

Rule 1.7(b) 25

Office of Att'y Recruitment & Mgmt., U.S. Dep't of Justice, *Reminder of Gov't Att'y Ethical Obligations to Client* (Nov. 2006), http://www.justice.gov/usao/ias/Employment/OARM 9.pdf 16

Office of Legal Counsel, U.S. Dep't of Justice, *Memorandum for the Attorney General re: Representation of Indian Tribes* (Aug. 11, 1977) 22

Miscellaneous—Continued: Page

Relationship Between Dep't of Justice Att'ys & Persons on Whose Behalf the United States Brings Suits Under the Fair Hous. Act, 19 Op. Off. Legal Counsel 1 (1995) 19, 21, 24, 40

Restatement (First) of Judgments (1942) 15

1 Restatement (Second) of Judgments (1982) 15

1 Restatement (Second) of Trusts (1959) 29, 30, 40

1 Restatement (Third) of Law Governing Lawyers (2000) 11, 27

1 Restatement (Third) of Trusts (2003) 29, 30, 40

S. 2035, 92d Cong., 1st Sess. (1971) 19

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 12

2A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* (4th ed. 1993) 40

James Simon, Deputy Assistant Att'y Gen., Environment & Natural Res. Div., U.S. Dep't of Justice, *Ethics: Conflicts of Interest and the Role of the Trustee, Remarks at Fed. Bar Ass'n 21st Annual Indian Law Conference* (Apr. 12, 1996) 18

Special Message to the Congress on Indian Affairs, Pub. Papers 564 (1970) 19

U.S. Dep't of Justice, *United States Attorneys' Manual*, http://www.justice.gov/usao/eousa/foia_reading_room/usam/ 18

In the Supreme Court of the United States

No. 10-382

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 590 F.3d 1305. The opinion of the Court of Federal Claims (Pet. App. 24a-90a) is reported at 88 Fed. Cl. 1.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2009. A petition for rehearing was denied on April 22, 2010 (Pet. App. 91a-92a). On July 7, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 20, 2010. On August 10, 2010, the Chief Justice further extended the time to and including September 19, 2010 (Sunday), and the petition was filed the next day. The petition for a writ of certiorari was granted on January

7, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App. *infra*, 1a-5a.

STATEMENT

1. In 2002, the Jicarilla Apache Nation (Tribe), a federally-recognized Indian tribe, sued the United States in the Court of Federal Claims (CFC) for an alleged breach of duties under treaties, Executive Orders, statutes, regulations, and contracts. Pet. App. 98a-120a. According to the Tribe's complaint, the Tribe occupies a 900,000-acre reservation in New Mexico that was set aside by Executive Order. The land contains timber, gravel, and oil and gas resources, development of which is governed by statutes administered by the Department of the Interior. *Id.* at 102a-104a; see *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982) (citing Indian Mining Leasing Act of 1938, 25 U.S.C. 396a *et seq.*). Funds derived from those natural resources—*e.g.*, mineral leasing royalties and timber sale proceeds—as well as from Indian Claims Commission judgments are held by the United States in trust for the Tribe. Pet. App. 104a-105a. The Tribe alleges that the Interior Department has failed to render an accurate accounting of the trust funds and other assets and has mismanaged those assets.[1] The Tribe seeks,

---

[1] The Secretary of the Interior (Secretary) is statutorily authorized to invest funds held in trust for Indian tribes. 25 U.S.C. 162a(a). To a lesser extent, the Tribe's allegations also implicate the Secretary of the Treasury, who invests such funds at the Interior Department's direction. 25 U.S.C. 161a(a).

inter alia, a complete accounting of all assets held in trust for the Tribe since 1946 and $300 million in damages. *Id.* at 115a-119a.

The current phase of the litigation covers the Tribe's claims relating to the government's actions with respect to certain trust-fund accounts from 1974 to 1992.[2] Pet. App. 26a. Over the course of more than five years, the United States produced to the Tribe many thousands of documents but identified (through multiple privilege logs) 155 potentially relevant documents that had been withheld on the basis of the attorney-client privilege and attorney work-product protection. *Id.* at 25a-26a. The documents withheld include memoranda, concerning administration of assets held in trust, that were exchanged between attorneys in the Interior Department's Office of the Solicitor[3] and various agency personnel from Interior, including the Bureau of Indian Affairs, and also similar documents from the Department of Justice and the Department of the Treasury. *Id.* at 50a-52a, 71a-84a.

2. The Tribe moved to compel production of the documents that had been withheld as privileged, arguing that they fell within an asserted "fiduciary exception" to the attorney-client privilege that has been recognized by some courts in the context of private, common-law trusts. The CFC granted, in relevant part, the Tribe's motion to compel. Pet. App. 24a-90a.

The CFC explained that a "fiduciary exception" to the attorney-client privilege, as applied in other con-

---

[2] The Tribe's claims relating to the management of non-monetary assets held in trust for the Tribe are to be evaluated in future phases of the case.

[3] Pursuant to 43 U.S.C. 1455, the Solicitor supervises and directs the legal work of the Department of the Interior.

texts, precludes a trustee from withholding from the beneficiary communications between the trustee and attorneys retained by the trustee that relate to trust management. Pet. App. 41a-44a. Relying on several CFC and district court opinions, the CFC concluded that there is nothing about the government's sovereign status or its relationship with Indian tribes that makes the fiduciary exception inapplicable. *Id.* at 44a-46a. The CFC stated that "basic trust principles are readily transferrable to the Indian trust context" (*id.* at 45a), notwithstanding that statutes rather than the common law establish the government's duties (*id.* at 31a) and that the government uses its own funds (not tribal trust funds) to pay for its legal advice (*id.* at 46a).

Applying the fiduciary exception it recognized to the documents at issue, the CFC ordered the government to produce to the Tribe approximately 75 documents—at least some of which the CFC had found were otherwise covered by the attorney-client privilege. Pet. App. 50a-63a, 69a, 71a-84a.[1]

---

[1] The CFC, in agreement with most courts, held in this case that no corollary "fiduciary exception" applies to the attorney work-product doctrine. It reasoned that the mutuality of interest between the fiduciary and the beneficiary no longer exists once there is sufficient anticipation of litigation to trigger work-product protection. Pet. App. 47a-48a. Accordingly, the CFC did not compel the government to produce documents that constituted attorney work product or did not relate to management of trust assets and thus fell outside the fiduciary exception the court recognized. *Id.* at 54a-63a, 69a.

An earlier CFC decision, however, reached the contrary conclusion, holding that a fiduciary exception does apply to the attorney work-product doctrine. *See Osage Nation and or Tribe of Indians v. United States*, 66 Fed. Cl. 244, 252 (2005). The Federal Circuit did not address the applicability of the fiduciary exception to work-product claims, and that issue therefore remains unresolved at the appellate level.

3. The United States petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus directing the CFC to vacate its production order. The Federal Circuit granted a temporary stay but then denied the mandamus petition in a published opinion. Pet. App. 1a-23a.

The Federal Circuit held that the government cannot deny a tribe's discovery request for attorney-client communications "when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." Pet. App. 1a-2a. The court relied on two rationales articulated by the CFC: First, the trustee is not the attorney's exclusive client because the trustee acts for the beneficiary; under that justification, the court explained, a fiduciary exception is just a logical extension of the client's control of the attorney-client privilege. Second, the trustee has a duty to disclose to the beneficiary all information concerning trust management; under that justification, the court explained, the attorney-client privilege gives way to the trustee's duty to disclose. *Id.* at 13a-14a, 41a-42a.

a. As to the first rationale, the Federal Circuit concluded that the Interior Department "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes." Pet. App. 15a. The court stated that the Tribe's "status as the 'real client' stems from its trust relationship with the United States." *Ibid.* The court noted that, in light of what it termed the "general trust relationship" between the United States and Indian tribes, "common law trust principles should generally apply to the United States when it acts as trustee over tribal assets," and that ap-

plication of a fiduciary exception in this case was thus "straightforward." *Id.* at 16a-17a.

The court rejected three counter-arguments to this rationale advanced by the United States. First, the court deemed "not relevant" this Court's instruction in *Nevada* v. *United States*, 463 U.S. 110 (1983), that "[t]he government cannot follow the fastidious standards of a private fiduciary," on the ground that the government had not articulated a "specific competing interest" (such as a conflicting statutory duty) that was considered when the communications were made. Pet. App. 17a-19a (quoting *Nevada*, 463 U.S. at 128). Second, the court—while acknowledging that the source of payment for the legal advice has been regarded by common-law courts as an important factor in determining whether a fiduciary exception to the attorney-client privilege applies— dismissed as unhelpful the fact that the government pays for its own legal advice, on the ground that the government (unlike, the court believed, a private trustee) has imposed the trust on the tribal beneficiary. *Id.* at 19a-20a. Third, the court found "not relevant" the government's concern that abrogation of the privilege would impair the Interior Department's ability to seek confidential legal advice, on the ground that the concern could be raised by any trustee and that no assets other than funds were at issue. *Id.* at 20a.

b. As to the second rationale, the Federal Circuit concluded that as a "general trustee," the United States has a "common law duty" to disclose to an Indian tribe information related to trust management, "including legal advice on how to manage trust funds." Pet. App. 21a-22a. The court rejected the government's argument that Congress's omission of attorney-client communications from the type of information Congress has re-

quired the Interior Department to provide to tribes negates any general common-law obligation to disclose such communications. The court stated that "the government has other trust responsibilities not enumerated" by statute, *ibid.* (quoting *Cobell* v. *Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001)), including, the court held, a common-law duty to disclose to the beneficiary all trust-related information, *ibid.*

4. After the Federal Circuit denied the mandamus petition and lifted its stay of the CFC's order, the CFC set a new production deadline. The CFC denied the government's motion for a stay pending a decision to seek further review of the Federal Circuit's decision. 91 Fed. Cl. 489. The government thereafter complied, producing the documents under a protective order that prevents disclosure to third parties until the case is resolved by this Court. Pet. App. 93a-97a.[5]

SUMMARY OF ARGUMENT

For the first time in the history of litigation between Indians and the United States, a court of appeals has held that the United States must disclose to an Indian tribe confidential communications between the government and its attorneys concerning the performance of governmental functions with respect to tribal property. That holding, which abrogates the government's attorney-client privilege based on common-law rules governing private trustees at common law, is based on two fundamentally flawed premises.

---

[5] The government's compliance with the production order, especially in light of the protective order, does not affect this Court's review. The Court may still provide effective relief by ordering the documents to be returned and excluded from evidence at trial. Cf. *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 606-607 (2009).

A. First, the Federal Circuit erred in treating the Tribe as the "real client" of the government attorneys.

1. Unlike a common-law trustee, the government's obligations to tribes and individual Indians are not derivative of the beneficiary's property interest. Rather, it is a bedrock principle of this Court's Indian law jurisprudence that the government's administration of laws concerning trust and other Indian property is a distinctly sovereign function. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437-438 (1912). Government attorneys therefore represent only the government, whose sovereign interests include (but are not necessarily limited to) carrying out any responsibilities that are imposed by statute, regulation, treaty, or executive order with respect to property held for Indians.

2. The notion that a tribe is the "real client" of government attorneys when those attorneys give legal advice also conflicts with the Executive Branch's longstanding understanding, as reflected in the Attorney General's 1979 guidance, that "the Attorney General is attorney for the United States in these cases, not a particular tribe." Pet. App. 123a. Unlike in other contexts, no statute or regulation displaces that understanding by creating an attorney-client relationship between government attorneys and tribes in the present context. To the contrary, the regulatory scheme does not contemplate direct or personal representation of Indians by the Justice Department in tribal trust matters.

3. The Federal Circuit's "real client" rationale raises professional responsibility and other practical concerns for government attorneys. In particular, treating tribes (and not just the government) as the client of govern-

ment attorneys creates potential conflicts of interest for those attorneys, who encounter the competing interests of multiple tribes, federal agencies, and statutes across different matters and issues. At the same time, the Interior Department, as a government agency, is limited in its ability to hire outside counsel to avoid such conflicts.

4. The government's status as the sole client is underscored by the fact that government attorneys are paid from the government's own funds, not from a trust corpus, see *Riggs National Bank* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976), and the fact that the records and information generated in administering the governing statutes belong outright to the United States, not to the trust corpus or to the tribe, *e.g.*, 25 C.F.R. 115.1000(a)(2).

B. Second, the Federal Circuit erred in relying on what it identified as a broad common-law duty of a trustee to disclose information, including confidential attorney-client communications, to the beneficiary.

1. To reach that result, the Federal Circuit invoked a "general trust relationship" between the United States and Indian tribes that it believed was "sufficiently similar to a private trust" to impose such a duty. Pet. App. 14a, 16a. But the Court's recent decisions in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), and *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009)—which the Federal Circuit did not even mention—reject reliance on a "general trust relationship" between the United States and tribes to impose common-law trust duties on the government. The *Navajo Nation* decisions instead establish that the government's legal obligations to tribes must be based on and are defined exclusively by statutes and regulations.

2. No statute or regulation, however, requires the government to disclose attorney-client communications to a tribe whenever those communications implicate the government's duties with respect to property held in trust for Indians. To the contrary, the American Indian Trust Fund Management Reform Act of 1994 provides a comprehensive list of specific disclosure obligations omitting any duty to disclose privileged communications to Indians, 25 U.S.C. 162a(d), and the Indian Claims Limitation Act of 1982 expressly limits the government's disclosure duty to nonprivileged information, Pub. L. No. 97-394, § 5(b), 96 Stat. 1978. If Indian tribes seek records beyond those the government provides pursuant to statute or regulation, they (like everyone else) must rely on the Freedom of Information Act for access, and are subject to the government's invocation of Exemption 5, 5 U.S.C. 552(b)(5), based on the attorney-client privilege.

3. The Interior Department generally must balance multiple responsibilities that might be in tension with maximization of tribal trust assets, such that the government need not "follow the fastidious standards of a private fiduciary." *Nevada* v. *United States*, 463 U.S. 110, 128 (1983). Competing interests arise not only with respect to management of natural resources but also in the management of trust funds, as demonstrated by one of the documents at issue in this case. Pet. App. 74a (Doc. No. 37). In any event, determining the applicability of the attorney-client privilege on a communication-by-communication basis would be unworkable and would unnecessarily chill the seeking of legal advice critical to the government's effective management of tribal trust issues.

ARGUMENT

THE FEDERAL CIRCUIT ERRED IN ABROGATING THE GOVERNMENT'S ATTORNEY-CLIENT PRIVILEGE IN MATTERS CONCERNING INDIAN PROPERTY

It is well recognized that the United States, like other litigants, may invoke the attorney-client privilege in civil litigation to protect confidential communications between government officials and government attorneys. See, *e.g.*, *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam) ("Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts."), cert. denied, 525 U.S. 996 (1998); 1 Restatement (Third) of the Law Governing Lawyers § 74, at 573 (2000) ("[T]he attorney-client privilege extends to a communication of a governmental organization."); *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982) ("[T]he privilege also functions to protect communications between government attorneys and client agencies or departments."); cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154-155 (1975) (noting applicability of attorney work-product protection to government attorneys). That is because "[t]he objectives of the attorney-client privilege * * * apply in general to governmental clients. The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture." 1 Restatement (Third) of the Law Governing Lawyers § 74 cmt. b at 573-574; see *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) ("[T]he Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be

deterred from full and frank communications with its counselors.").

Case law under the Freedom of Information Act (FOIA) further demonstrates the availability of the attorney-client privilege to the government in civil proceedings. Under Exemption 5 of FOIA, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from mandatory disclosure. 5 U.S.C. 552(b)(5). Courts have long recognized that "Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege." *Coastal States Gas Corp.*, 617 F.2d at 862; see, *e.g.*, *Tax Analysts* v. *IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) ("In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer."). Indeed, as this Court has recognized, the legislative history of FOIA expressly confirms the applicability of the attorney-client privilege to government agencies. See *Sears, Roebuck & Co.*, 421 U.S. at 154 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) (including within Exemption 5 "documents which would come within the attorney-client privilege if applied to private parties")). Notably, lower courts have applied Exemption 5 to deny FOIA requests for documents concerning tribal assets from Indian tribes, alleging a violation of the government's "trust responsibility," based on the government's assertion of the attorney-client privilege and attorney work-product protection. See, *e.g.*, *Skull Valley Band of Goshute Indians* v. *Kempthorne*, No. 04-cv-00339, 2007 WL 915211, at *3, *14 n.8 (D.D.C. Mar. 26, 2007) (attorney-client privilege); *Shinnecock Indian Nation* v. *Kempthorne*, 652 F.

Supp. 2d 345, 352, 362-363 (E.D.N.Y. 2009) (attorney work-product protection).

The Federal Circuit nonetheless advanced two rationales to deny the protection of the attorney-client privilege in this case: (1) the Tribe is the government attorneys' "real client" (Pet. App. 15a-20a); and (2) the United States is like a private, common-law trustee operating under a general "common law duty to disclose" information, including information protected by the attorney-client privilege, to Indian beneficiaries (Pet. App. 21a-22a). Both rationales are inconsistent with the United States' unique status as a sovereign, whose officers and employees administer statutes that exclusively define the government's duties. That status has been recognized in both this Court's precedents and the Executive Branch's considered guidance, and it fundamentally distinguishes the United States from a private, common-law trustee.

A. The Government, Not The Tribe, Is The "Real Client" Of Government Attorneys

The Federal Circuit's conclusion that the Interior Department "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes" (Pet. App. 15a), is incorrect and departs from several of this Court's decisions and the settled Executive Branch position on the issue.

1. This Court's precedents establish that the United States acts distinctly as a sovereign, not as a common-law trustee, in matters affecting Indian assets

This Court has long recognized that the United States has distinctly sovereign interests in the administration of Acts of Congress concerning tribal property,

including property it holds in trust for tribes, and that the United States' interests are not derivative of those of a beneficiary as at common law. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437-438 (1912). Consistent with that basic principle, the Court has deemed the United States the real party in interest when it acts to protect tribal interests. See *ibid.*; see also *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 6 n.1 (2001) (the government is "not technically acting as [the Tribe's] attorney") (citation omitted). It follows that the United States is the only "real client" of the government attorneys who provide legal advice to the federal officers responsible for carrying out statutory duties with respect to Indians.

Heckman involved a suit by the United States to cancel certain conveyances of allotted lands by members of an Indian tribe on the ground that the conveyances violated restrictions on alienation imposed by Congress. 224 U.S. at 415-416. In permitting the suit to go forward, the Court referred to the unique sovereign interest of the United States with respect to Indian affairs as distinct from any property or common-law trust interest: "While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is *distinctly an interest of the United States* * * * not to be expressed in terms of property, or to be limited * * * to the holding of a technical title in trust." *Id.* at 437 (emphasis added).

In *Minnesota*, which involved a suit by the United States seeking relief against a State that had errone-

ously conveyed lands that ought to have been reserved for Indians, the Court held that the United States—not the Indians—was the real party in interest. 270 U.S. at 193-194. In so doing, the Court concluded that the government's interest in its guardianship over the Indians "is one which is vested in it *as a sovereign*." *Id.* at 194 (emphasis added).

Candelaria reinforces the conclusion that government attorneys acting in furtherance of the United States' sovereign responsibilities in Indian affairs represent only the United States. In *Candelaria*, the Court held that res judicata did not prohibit the United States from suing to quiet title to lands on behalf of an Indian tribe, even though the tribe had unsuccessfully brought the same suit twice before without the United States' involvement. 271 U.S. at 438, 443. The Court stated that the United States had an independent interest in enforcing a restriction on alienation of the tribe's lands, and that such interest could not be affected by a judgment in suits the United States had not joined. See *id.* at 443-444. If the tribe had been the "real client" of the government attorneys in *Candelaria*, then res judicata would have barred the action. See Restatement (First) of Judgments § 85(2), at 402-403 (1942) ("Where a person is bound by * * * the rules of res judicata because of a judgment for or against him with reference to a particular subject matter, such rules apply in a subsequent action brought or defended by another on his account."); see also 1 Restatement (Second) of Judgments § 41(1)(a) and (d) at 393 (1982).

Those cases affirm that the United States acts as a sovereign—and the government's attorneys represent the sovereign—with respect to Indian affairs. Cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148

(1982) ("[S]overeign power, even when unexercised, is an enduring presence * * * and will remain intact unless surrendered in unmistakable terms."). In none of those cases did the Court's conclusion depend, as the Federal Circuit suggested (Pet. App. 19a), on whether the United States had considered a "specific competing interest" in carrying out its responsibilities or on the effect of any such competing interest on the duties of government officials. The Federal Circuit's conclusion that the Tribe is the "real client" of government attorneys thus cannot be squared with this Court's decisions.

2. Executive Branch guidance makes clear that government attorneys represent the United States, not a particular Indian tribe, in tribal trust matters

The Federal Circuit's conclusion that Indian tribes are the "real clients" of government attorneys also cannot be squared with those attorneys' role in assisting Executive Branch officials to fulfill the constitutional mandate to "take Care that the Laws be faithfully Executed." U.S. Const. Art. II, § 3. In furtherance of that mandate, the Attorney General is charged with representing the interests of the United States and its agencies in court, 28 U.S.C. 516, 519, including the interests of the United States concerning Indians and Indian tribes. Similarly, the Solicitor supervises and directs the legal work of the Department of the Interior pursuant to 43 U.S.C. 1455. In carrying out those statutory responsibilities, attorneys in the Justice and Interior Departments, like other Executive Branch personnel, have a duty of loyalty to the United States Government in the performance of their duties.[6] These statutory and

[6] *E.g.*, 5 C.F.R. 2635.101(a); 43 C.F.R. 20.501; see Office of Attorney Recruitment and Management, Dep't of Justice, *Reminder of Gov't*

regulatory roles in litigation on behalf of and counseling the Executive Branch of the United States Government are materially different from the work of a private attorney representing a private, common-law trustee.

In 1979, in a letter to the Secretary of the Interior, Attorney General Bell set forth the legal principles governing the institutional role of the Department of Justice in representing the United States in litigation involving Indian property. Among other things, the Attorney General emphasized:

> [T]he Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as "trustee," not the "beneficiary." He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.

Pet. App. 123a-124a.

Att'y Ethical Obligations to Client (Nov. 2006), http://www.justice.gov/usao/eas/Employment/OARM_9.pdf ("Department of Justice attorney[s] * * * have an obligation to safeguard information and documents relating to the representation of your client," which is, "in most circumstances, the Executive branch of the United States or the Department.").

That letter, which rejects the contention that the tribe (rather than the United States) is the Attorney General's client, is entitled to significant deference because it reflects the longstanding interpretation of the Attorney General of his statutory duties in representing the United States in litigation and the agency's long prevailing view of the role of its own attorneys. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984); cf. *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2477 (2009) (according deference to agency decision to follow past practice). Indeed, for over 25 years, the *United States Attorneys' Manual* (*USAM*) has referred to that letter as guidance for government attorneys conducting litigation affecting Indians.[7]

The substance of the Attorney General's conclusion is consistent with the understanding of the government's sovereign interests reflected in the Court's Indian law cases that preceded it, described above at pp. 13-15, *su-*

[7] See *USAM* § 5-14.130, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title5/14mcnv.htm#5-14.130 (referencing *id.*, *ENRD Resource Manual*, No. 59, www.justice.gov/usao/eousa/foia_reading_room/usam/title5/cnv00059.htm). Officials of the Justice Department's Environment and Natural Resources Division (ENRD)—which represents the United States in litigation, both affirmatively and defensively, concerning Indians—have reiterated the same view. See Letter from Lois J. Schiffer, Acting Assistant Att'y Gen., United States Dep't of Justice, to Geoffrey C. Hazard, Jr., Professor, Yale Law School & Charles W. Wolfram, Professor, Cornell Law School 2 (June 16, 1994) ("The Department * * * represents the United States and not particular Indian tribes."); James Simon, Deputy Assistant Att'y Gen., ENRD, United States Dep't of Justice, *Ethics: Conflicts of Interest and the Role of the Trustee*, Remarks at Fed. Bar Ass'n 21st Annual Indian Law Conference 1 (Apr. 12, 1996) ("In brief, there is no conflict of interest when Department of Justice represents the United States in its capacity as a trustee for Indians and tribes.").

pra. The Attorney General's conclusion also is consistent with decisions of this Court that followed it. In particular, in *Nevada* v. *United States*, 463 U.S. 110 (1983), the Court recognized that the government acts in matters affecting Indian tribes in its capacity as a sovereign. The fact that the United States may face competing interests when acting in furtherance of interests affecting tribal property therefore does not pose a disabling conflict for the government, *id.* at 128, or, *a fortiori*, for the attorneys representing the government. The Attorney General's letter is also consistent with legal opinions of the Office of Legal Counsel that the Attorney General's role in analogous contexts is to represent the overall interests of the United States rather than those of a particular private or governmental entity. See *Relationship Between Dep't of Justice Att'ys & Persons on Whose Behalf the United States Brings Suits Under the Fair Housing Act*, 19 Op. Off. Legal Counsel 1, 2-4 (1995) (1995 OLC Op.) (Fair Housing Act complainant is not the Attorney General's client even when the Attorney General brings suit "on behalf of" the complainant); *Attorney General's Role as Chief Litigator for the United States*, 6 Op. Off. Legal Counsel 47, 54 (1982) (1982 OLC Op.) (Attorney General represents interests of the Executive Branch rather than those of a "client" agency when litigating on its behalf).[8]

[8] Although settled since at least 1979, the Executive Branch's view on how to reconcile the potentially competing interests of the United States with respect to Indian property rights differed for a brief period in the early 1970s. Believing that the government faced an "inherent" conflict in some such situations, President Nixon requested legislation to create an Indian Trust Counsel Authority within the Executive Branch "to assure independent legal representation for the Indians' natural resource rights." *Special Message to Congress on Indian Affairs*, Pub. Papers 564, 573 (1970); see S. 2035, 92d Cong., 1st. Sess.

There is no reason to distinguish for present purposes between the Attorney General (and other Justice Department attorneys) and those in the Interior Department's Office of the Solicitor. Both provide confidential legal advice to agency personnel with respect to the administration of Acts of Congress affecting Indian property. The Solicitor represents the Interior Department's interests (including but not limited to interests in matters concerning Indian tribes and individuals), just

(1971); H.R. 6106, 6374, 6494, 93d Cong., 1st Sess. (1973). Although that proposal was never enacted, the Department of Justice under Presidents Nixon and Ford filed briefs on several occasions accompanied by a separate statement or letter from the Secretary of the Interior when the Secretary disagreed with the Justice Department's views on Indian law issues. See, *e.g.*, *United States* v. *Winnebago Tribe*, 542 F.2d 1002, 1005 n.5 (8th Cir. 1976); *United States* v. *Critzer*, 498 F.2d 1160, 1161-1162 (4th Cir. 1974); *Stevens* v. *Commissioner*, 452 F.2d 741, 745 & n.10 (9th Cir. 1971); see also Memorandum for United States at 4, 9-15 (Appx. B), *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976) (including the Interior Department's separate views where the Justice Department had represented individual Indian against the tribe pursuant to 25 U.S.C. 175); U.S. Br. 14, *United States* v. *Mason*, 412 U.S. 391 (1973) (No. 72-654) (noting the government's "clear conflict of interest" in a case concerning taxation of an Indian decedent's estate). Subsequent Administrations rejected President Nixon's view, however, because it was inconsistent with the Executive Branch's responsibility to speak with a unitary voice. The government therefore returned to the pre-Nixon Administration approach. That renewed position is articulated in Attorney General Bell's 1979 letter, to which the Executive Branch has adhered ever since. See *Federal Government's Relationship with American Indians: Hearings Before the Special Comm. on Investigations of the Senate Select Comm. on Indian Affairs*, 101st Cong., 1st Sess. Pt. 1, at 43 (1989) (statement of Bradley H. Patterson, Jr., Executive Assistant to Leonard Garment, Special Counsel to President Nixon); cf. *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) (explaining that judicial deference to an agency's position is not diminished merely because the position has changed).

as the Attorney General represents the interests of the United States. 43 U.S.C. 1455; Pet. App. 123a-124a.[9]

Nor is there any statutory or regulatory basis in this context that could justify a departure from the settled rule that the government is the sole client of government attorneys. With some exceptions, Congress has made it punishable as a felony with up to five years imprisonment and a $250,000 fine for a federal employee willfully to act as an attorney for anyone before a federal agency or court in connection with a particular matter in which the United States has a direct and substantial interest. See 18 U.S.C. 205, 216(a)(2); see also 18 U.S.C. 3571(b)(3). Although that criminal prohibition is subject to an exception when the employee is acting "in the proper discharge of his official duties," in the few situations in which Congress or the Executive has created an attorney-client relationship between government attorneys and a party other than the government, its intent has been manifest. See, *e.g.*, 10 U.S.C. 827 (judge advocate serving as military defense counsel); 18 U.S.C. 3006A(g)(2)(A) (federal public defenders representing criminal defendants); 28 C.F.R. 50.15(a) (Justice Department's formal representation of individual government employees); see also 1995 OLC Op. 3-4.

Neither Congress nor the Executive has provided for an attorney-client relationship between government

[9] Two of the documents ordered to be produced in this case were prepared by the Department of Justice: a 1966 letter from the Attorney General to the Secretary of the Treasury about whether certain instruments issued by the Federal National Mortgage Association give rise to a general obligation of the United States backed by its full faith and credit (Pet. App. 80a (Doc. No. 217)); and a 1966 memorandum from the Office of Legal Counsel to the Treasury Department about whether trust funds may be invested in obligations of federal land banks and the Banks for Cooperatives (Pet. App. 75a (Doc. No. 63)).

attorneys and an Indian tribe with respect to the administration of a federal statute affecting Indian property, and the Federal Circuit did not point to any statute or regulation suggesting that either has. To the contrary, Interior Department regulations confirm that in "ordinary circumstances," legal services concerning trust resources are provided either by a tribe's private counsel or by "the United States as trustee through the Office of the Solicitor and/or the Department of Justice." 25 C.F.R. 89.40. As discussed above (pp. 17-19, *supra*), the Justice Department's provision of legal counsel in matters concerning Indian property is pursuant solely to its representation of the United States rather than the tribe. Moreover, the Interior Department's general policy is "not to use federally appropriated funds to pay for private counsel to represent Indian tribes." 25 C.F.R. 89.40. One exception (among others) is when government counsel disagrees with the tribe on legal issues implicating the tribe's trust-related interests. 25 C.F.R. 89.42(d). That the government is free to depart from the tribe's preferred course of legal action further demonstrates that the government is acting as a sovereign, not a common-law trustee, in this context. The regulations clearly do not contemplate government attorneys representing Indians directly or in their personal capacity; rather, their only client is the United States.[10]

[10] Although 25 U.S.C. 175 states that "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity"—and although that provision allows selected direct representation of Indians in certain circumstances—it does not affect representation on behalf of the United States in its sovereign capacity as discussed in Attorney General Bell's 1979 letter. Pet. App. 123a ("[T]he Attorney General is attorney for the United States in these cases, not a particular tribe or

3. The Federal Circuit's rule would present professional ethics problems and significant practical concerns

By departing from the Executive Branch's established understanding of the role of its attorneys as representing the United States as a sovereign rather than

individual Indian."); see Office of Legal Counsel, *Memorandum for the Attorney General re: Representation of Indian Tribes* at n.3 (Aug. 11, 1977) ("The statute is of limited significance for present purposes, however, because the Department generally represents the United States in matters relating to the trust relationship arising out of statutes or treaties affecting a particular tribe."); Floyd L. France, *Recent Developments in Indian Litigation*, 13 Land & Nat. Resources Div. J. 73, 78 (1975) ("Where the United States is the moving party, the action can and should be brought in the name of the United States and there is no need whatever for considering the applicability of section 175."). Moreover, Section 175 does not compel the United States attorney to represent or bring suit on behalf of Indians. See, *e.g.*, *Pyramid Lake Paiute Tribe* v. *Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974) (per curiam) (25 U.S.C. 175 "impose[s] only a discretionary duty of representation"), cert. denied, 420 U.S. 962 (1975); *Rincon Band of Mission Indians* v. *Escondido Mut. Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972) (25 U.S.C. 175 is "not mandatory"). And, on its face, the statute addresses only litigation—not the type of non-litigation advice at issue in this context concerning the Interior Department's administration of statutes affecting Indian property. The Federal Circuit nevertheless proceeded as if a statute like Section 175 operates to create an attorney-client relationship whenever government attorneys render advice to Executive Branch officials on such matters. No such statute exists.

In 25 C.F.R. 1200.40(a), the Interior Department notes that it will make its legal expertise "fully available to advise tribes in developing, implementing, and managing investment plans." This Office has been informed that in implementing Section 1200.40(a), the Interior Department provides information about applicable law but refers any request for actual legal advice—applying the law to a factual situation—to tribal or individual counsel. That regulation, as interpreted by the Interior Department, thus does not provide a basis for an attorney-client relationship with tribes even when it applies.

an Indian tribe or individual Indians, the decision below creates significant practical concerns. Taken to its logical conclusion, the Federal Circuit's denomination of the Tribe as the "real client" raises a plethora of difficult questions pertaining to the professional responsibilities of government attorneys.

For example, under the Federal Circuit's reasoning, the attorney's duty to the government might at times conflict with Rule 1.2 of the Model Rules of Professional Conduct, which "requires that a lawyer follow a client's decisions concerning the objectives of representation, mandates that an attorney consult with the client as to means, and requires that the attorney heed a client's decision whether to accept an offer of settlement." 1995 OLC Op. 4. Other questions for government attorneys advising government officials on matters affecting trust and other Indian property might include whether the relevant tribal interests would be "directly adverse" to the attorney's representation in another matter; whether there is a "significant risk" that protecting tribal interests would be "materially limited" by the government's responsibilities in another matter; or whether a purported conflict has been waived through a tribe's informed consent accompanied by a "reasonabl[e] belie[f]" that the government attorneys could competently protect tribal interests. Model Rules of Prof'l Conduct R. 1.7 (2007).

Accordingly, under the "real client" rationale, the Justice Department's representation of another federal agency—for instance, in an environmental enforcement action against a tribally-owned entity—could create concerns in light of the Solicitor's role in advising Interior Department personnel on the administration of statutes governing certain tribal property interests. Moreover,

the Interior Department itself must sometimes render decisions adverse to an Indian tribe as part of its duties under various statutes—such as under the Indian Reorganization Act's provisions authorizing the Secretary to acquire land in trust on behalf of Indian tribes, whereby the Interior Department exercises discretion in granting or denying a tribe's application to take land into trust. See 25 U.S.C. 465; 25 C.F.R. Pt. 151.

Relatedly, a *particular* tribe cannot be the "real client" of the government's counsel, because the interests of different tribes are sometimes incompatible. If a particular tribe were the government attorneys' "real client," they could not act with respect to *other* tribes where representation of the former was "materially limited by the [government] lawyer's responsibilities" to the latter—absent informed consent and a reasonable belief that the tribes' interests could be protected.[11] Model Rules of Prof'l Conduct R. 1.7(b). A number of past inter-tribal conflicts make this concern more than hypothetical. See, *e.g.*, *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937) (breach-of-treaty suit where Shoshone Tribe was permanently excluded from possession of half of its tribal lands by Northern Arapahos under United States military escort); *Sekaquaptewa* v. *MacDonald*, 619 F.2d 801 (9th Cir.) (quiet-title action in long-running land dispute between the Hopi Tribe and Navajo Nation), cert. denied, 449 U.S. 1010 (1980); *Western Shoshone Legal Def. & Educ. Ass'n* v. *United States*,

[11] Waiver would not only be logistically difficult to accomplish with all the tribes whose interests might be affected, but might also be subject to judicial second-guessing as to whether the government lawyer could have "reasonably believe[d]" that the representation of a particular tribe would not be adversely affected. Model Rules of Prof'l Conduct R. 1.7(b).

531 F.2d 495 (Ct. Cl.) (suit by individual members of Western Shoshone identifiable group to stay takings claim by the federally-recognized tribal organization), cert. denied, 429 U.S. 885 (1976).

Although private attorneys may face similar questions on occasion (albeit to a lesser degree), their clients (*e.g.*, private fiduciaries) have the option of retaining other counsel to avoid potential conflicts or other problems. That is not so for the Interior Department and most other federal agencies, which, absent express statutory authorization, are prohibited from retaining outside counsel. See 5 U.S.C. 3106; 1982 OLC Op. 52 (interpreting Section 3106 to "preclude payments to non-agency or non-Justice Department attorneys for (legal) advisory functions"). And unlike the government, tribes and individual Indians may retain their own private counsel, including in limited instances at the government's expense, thereby further shattering any illusion that government attorneys serve as their personal lawyer. See, *e.g.*, 25 U.S.C. 81a, 81b; 25 C.F.R. 89.41; see also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 372 (1968). Indeed, some Indian tribes employ their own Attorney General or in-house counsel—underscoring the conclusion that the government's attorneys do not fulfill that function.[12]

Additionally, the Federal Circuit's decision creates a risk that tribes, once in possession of privileged documents or information, might unilaterally attempt to waive the privilege by disclosing the documents to third parties—a potential problem of particular concern to the

[12] See, *e.g.*, Tohono O'odham Code, Tit. 20, Ch. 1, http://www.tolc-nsn.org/docs/Title20Ch1.pdf (1991); Ho-Chunk Nation Code, Tit. 1, § 8, http://www.ho-chunknation.com/UserFiles/HCC_Sec.8_Justice_2.3.09.pdf (2009).

government given its competing sovereign obligations. The Second Circuit has described private fiduciaries and their beneficiaries as "joint clients" on matters of trust administration. See *In re Long Island Lighting Co.*, 129 F.3d 268, 273 (1997). Even in that situation, one "client" should not be permitted, unilaterally, to waive the privilege as to the other joint client's communications with the attorney. See *In re Teleglobe Comme'ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) (citing 1 Restatement (Third) of the Law Governing Lawyers § 75(2) cmt. e at 581-582). Both the Restatement (in a Reporter's Note) and the Third Circuit, however, note that "the caselaw on this point is not as uniform as one would hope." *Id.* at 363 n.17.

For all the above reasons, the Federal Circuit's conclusion that an Indian tribe is the government attorney's "real client" on matters involving trust property of the tribe cannot be true without creating potentially intractable conflicts of interest and other practical problems. And to the extent the Federal Circuit used the term "real client" in some less formal sense (see Br. in Opp. 15-17), the concept would no longer support the Federal Circuit's proffered rationale for its "fiduciary exception" to the attorney-client privilege, *i.e.*, that the Tribe controls the privilege as the client. See Pet. App. 13a ("Under this justification, the fiduciary exception is but a logical extension of the client's control of the attorney-client privilege.").

4. That government attorneys are paid from government funds, not tribal trust funds, reinforces the conclusion that the government is the client

Government attorneys, even when they provide advice concerning the performance of statutory functions with respect to the property of a particular tribe or indi-

vidual Indian, are paid from government funds rather than from funds held in trust for the tribe or from income derived from other property of the tribe or individual. That established arrangement reinforces the conclusion that the government, not the tribe, is the government attorneys' client. Even in cases involving private fiduciaries, courts, including in what the Federal Circuit acknowledges to be the "leading American case" (Pet. App. 11a), have considered whether legal expenses are paid from the trust corpus as an important factor in determining who is the actual owner of the information and thus possesses the right to control it. See *Riggs Nat'l Bank* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976) ("[T]he payment to the law firm out of the trust assets is a significant factor, not only in weighing ultimately whether the beneficiaries ought to have access to the document, but also it is in itself a strong indication of precisely who the real clients were."); see also *Wachtel* v. *Health Net, Inc.*, 482 F.3d 225, 236 (3d Cir. 2007) ("[W]hen a fiduciary obtains legal advice using its own funds, the payment scheme is an indicator (albeit only an indicator) that the fiduciary is the client, not a representative.").

Here, the legal advice was rendered by government attorneys whose salaries are paid out of congressional appropriations, not the trust corpus. See, *e.g.*, Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, Div. E, Tit. I, 123 Stat. 718 (Interior Department); Pub. L. No. 111-8, Div. B, Tit. II, 123 Stat. 569 (Justice Department). The Federal Circuit dismissed that statutory arrangement as unhelpful because, it posited, in "contrast to a private trust case," the United States "imposes the trust on the beneficiaries" in the case of property held for Indians. Pet. App. 19a-20a. But establishment

of a trust by the United States is of no moment. It is commonplace for even a private trust to be created by a settlor without the consent of the beneficiaries. 1 Restatement (Second) of Trusts § 36, at 100 (1959); see also 1 Restatement (Third) of Trusts § 14, at 216 (2003). In any event, the United States' distinct role under statutes, treaties, and Executive Orders governing the creation or administration of a trust held for the benefit of Indians, or otherwise setting aside or supervising transactions affecting their property, simply underscores the uniquely sovereign character of the United States' functions and the impropriety of imposing judicially fashioned common-law rules and concepts on the United States and its officers and employees. See *Cobell* v. *Salazar*, 573 F.3d 808, 811 (D.C. Cir. 2009) ("[B]ecause 'Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense,' we held that the [statute] did not 'grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee' to order 'the best imaginable accounting without regard to cost.'") (quoting *Cobell* v. *Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)), cert. dismissed, 130 S. Ct. 3497 (2010)).

In addition, both the Federal Records Act of 1950 and Interior Department regulations establish that the government itself owns the records produced when agency personnel solicit legal advice from government attorneys regarding the administration of statutes affecting trust and other Indian property. See 44 U.S.C. 2901(1), 3301 (defining "record" as "all * * * documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or

appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them"); 25 C.F.R. 115.1000(a)(2) (trust fund records "are the property of the United States if they * * * [e]vidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part."); see also, *e.g.*, 25 C.F.R. 15.502, 162.111, 166.1000 (providing for the government's ownership of probate, leasing, and grazing records associated with the government's tribal trust function). The government's ownership of all records under controlling statutes and regulations confirms the conclusion that it, not the Tribe, controls access to and assertion of any privilege over those records.

B. The Government Does Not Have A Common-Law Duty To Disclose Attorney-Client Privileged Communications To Indian Tribes

The Federal Circuit also erred by relying on a private trustee's common-law duty to disclose certain information to a beneficiary. According to the Federal Circuit, "[a]s a general trustee, the United States has a fiduciary duty to disclose information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds." Pet. App. 21a (citing Restatement (Third) of Trusts § 82(2); Restatement (Second) of Trusts § 173)). Contrary to the Federal Circuit's view, however, the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law. No statute or regulation imposes the sort of generalized duty of disclosure the Federal

Circuit posited, much less a duty to disclose information protected by the attorney-client privilege. And given that the government has no generalized common-law-type duty of disclosure, there is no basis to import into this government context a common-law fiduciary exception to the attorney-client privilege that is premised on the existence of such a duty.

1. This Court's Navajo Nation *decisions preclude the Federal Circuit's imposition of a freestanding common-law duty*

As established above, in contrast to a private trustee, the government acts in its sovereign capacity in the administration of statutes in the area of Indian affairs. That sovereign status, and the statutory and regulatory framework for governing the Interior Department's duties with respect to Indian affairs, preclude importation of broad common-law trust concepts. That is especially so where those obligations would undermine the government's execution of its sovereign functions. Requiring the government to disclose to tribes otherwise privileged communications between the government and government attorneys would do just that.

a. Most fundamentally, the Federal Circuit's imposition on the government of a "common law duty to disclose information" (Pet. App. 22a) to the Tribe cannot be reconciled with the Court's decisions in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo Nation I*), and *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009) (*Navajo Nation II*). Those decisions reject the notion that common-law trust principles can create judicially enforceable obligations in the government; only a specific statutory or regulatory mandate can do so.

In *Navajo Nation I*, this Court reversed a decision by the Federal Circuit that control inherent in the Secre-

tary's approval of mineral leases was sufficient to demonstrate a money-mandating fiduciary obligation cognizable under the Indian Tucker Act, 28 U.S.C. 1505. 537 U.S. at 501. The Court held that the Interior Department's legal obligations must be based on specific statutes and regulations, and that those at issue did not provide the requisite "substantive law" that could, in turn, mandate federal compensation if breached. *Id.* at 507 (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983) (*Mitchell II*)). In so holding, the Court applied a two-step test: *first*, the tribe or individual Indian must "identify a substantive source of law that establishes specific fiduciary or other duties" and allege a failure to perform those duties; *second*, if that threshold is met, then the tribe or individual must show that the substantive law "can fairly be interpreted as mandating compensation" for injury caused by a breach. *Id.* at 506 (quoting *Mitchell II*, 463 U.S. at 216-217, 219). Reference to a general trust relationship alone is "insufficient to support jurisdiction under the Indian Tucker Act;" rather, the court must look to the relevant statutes or regulations. *Ibid.*

In *Navajo Nation II*, this Court again reversed the Federal Circuit's judgment that the tribe had properly invoked Indian Tucker Act jurisdiction. 129 S. Ct. at 1558. The Federal Circuit had suggested, on remand from *Navajo Nation I*, that the government's "comprehensive control" over coal leasing on tribal lands could give rise to fiduciary duties based on common-law trust principles that are enforceable in court. *Id.* at 1557. Reiterating the two-step test applied in *Navajo Nation I*, this Court rejected that notion. *Id.* at 1558. The Court explained that, absent a clear statutory duty, "neither the Government's 'control' over

coal *nor common-law trust principles* matter." *Ibid.* (emphasis added).

The Federal Circuit's premise in this case that "common law trust principles should generally apply to the United States when it acts as trustee over tribal assets" (Pet. App. 16a) cannot be reconciled with the Court's *Navajo Nation* decisions. In those decisions, the Court has twice rejected that mode of analysis in the Indian Tucker Act context, and the Federal Circuit's attempt to resurrect that reasoning in this case for a third time—without any citation, let alone discussion, of either *Navajo Nation* decision—is no more defensible. Other courts of appeals have recognized the unique nature of the government's functions in the administration of Indian affairs as a justification for not importing common-law trust duties into this context. See *Cobell* v. *Salazar*, 573 F.3d at 811 ("Because of the unique nature of this [Indian] trust, we held that 'the common law of trusts doesn't offer a clear path for resolving' the 'ambiguities' involved in setting the parameters of an accounting.") (quoting *Cobell* v. *Norton*, 428 F.3d at 1074); see also *Gros Ventre Tribe* v. *United States*, 469 F.3d 801, 813 (9th Cir. 2006) ("Whatever duty exists at law today must be expressly set forth in statutes or treaties."), cert. denied, 552 U.S. 824 (2007).

b. The limited statutory mandates governing tribal funds held "in trust" (*e.g.*, 25 U.S.C. 161a(a), 162a(a), 4011(a); see pp. 35-36, *infra*) are an insufficient hook for importing broad common-law trust duties such as a generalized duty to disclose all information related to administration of property held in trust, especially information subject to the attorney-client privilege. See *Cobell* v. *Norton*, 392 F.3d 461, 471, 472 (D.C. Cir. 2004) (holding that "government's duties must be rooted in

and outlined by the relevant statutes and treaties" and cannot be "abstracted * * * from any statutory basis") (internal quotation marks omitted); Floyd L. France, *Recent Developments in Indian Litigation*, 13 Land & Nat. Resources Div. J. 73, 78 (1975) ("Only those duties exist which are provided in some treaty, agreement, order or statute."). Where this Court has construed a statute to require the United States to "hold the land" allotted for individual Indians "in trust for the sole use and benefit" of those Indians, the Court did not on that basis then import common-law trust principles even with respect to the Indian property itself, much less the distinct issue of disclosure of *government* records and information. *United States* v. *Mitchell*, 445 U.S. 535, 541 (1980) (*Mitchell I*) (quoting Indian General Allotment Act, 25 U.S.C. 348 (1976)). Instead, the Court interpreted that statute not to impose a duty to manage allotted forest lands. *Id.* at 546. The statute, at most, created a "bare trust" entailing only limited responsibilities. *Mitchell II*, 463 U.S. at 224. As the Court explained, the relevant statutes and regulations must not only establish a trust relationship, but also "define the contours of the United States' fiduciary responsibilities." *Ibid.*

The Federal Circuit's reliance (Pet. App. 16a-17a) on *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), is misplaced. In *White Mountain*, the Court interpreted a federal statute to require the government, *inter alia*, to preserve tribal property that the statute authorized the government to use for its own purposes. *Id.* at 475; see *id.* at 479-480 (Ginsburg, J., concurring). The government's duties thus arose not from a "general trust relationship" or generic "common-

law trust principles," but rather from the unique statute at issue in that case.[13]

c. The legal relationships between the United States and Indians (and Indian property) do not fall into a single category that can be labeled or characterized generically as a "trust" in the common-law sense. Rather, the precise nature of the relationship depends on a number of variable factors.

First, the United States may have statutory responsibilities applicable to the property of Indian tribes, of individual Indians only, or both. Although this case involves property held in trust for the Tribe alone, the *Cobell* case involved individual indian money (IIM) accounts. *E.g.*, *Cobell*, 392 F.3d at 463. Indeed, Interior has informed this Office that, as of January 31, 2011, there are over 380,000 open IIM accounts. With respect to such accounts, the Federal Circuit's generalized common-law duty of disclosure could require the government to respond to requests for privileged and other information from hundreds of thousands of individual Indians, outside the established framework of statutes and regulations governing the furnishing of information to tribes and individual Indians.

[13] *White Mountain* was decided the same day as *Navajo Nation I*, and Justice Ginsburg, who authored the latter opinion, joined the Court's opinion in *White Mountain* (a 5-4 decision) based on the express understanding that it was "not inconsistent" with *Navajo Nation I*. *White Mountain*, 537 U.S. at 479 (Ginsburg, J. concurring). Justice Souter, who authored *White Mountain*, acknowledged in dissent in *Navajo Nation I* that the second stage of the relevant inquiry in Indian Tucker Act cases (concerning whether there is a duty to pay compensation for a violation) occurs only "once a statutory or regulatory provision is found to create a specific fiduciary obligation." *Navajo Nation I*, 537 U.S. at 514 (Souter, J., dissenting).

Second, some individual allotments are held by the United States in trust and some are owned in fee by an Indian subject to certain restraints on alienation. See 18 U.S.C. 1151 (defining "Indian country" as including all land within Indian reservations as well as all Indian allotments); *Heckman*, 224 U.S. at 415-416. And allotments held in trust under the Indian General Allotment Act, 25 U.S.C. 348 (1976), are a bare trust that requires no active management on the part of the United States. See p. 34, *supra*; *Mitchell I*, 445 U.S. at 541. *Third*, some tribal land was set aside by Executive Order; some tribal land is held in trust; and some once-aboriginal tribal land is now protected by treaty. See *Merrion*, 455 U.S. at 133-134; *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-231 (1985). *Fourth*, some statutory provisions require Interior to approve leases or otherwise exercise some measure of control over Indian property rights, but do not impose specific trust duties on the United States. See pp. 32-33, *supra*; *Navajo I*, 537 U.S. at 507; *Navajo Nation II*, 129 S. Ct. at 1558. And some statutes do impose specific duties, but those duties are not defined by whether the land itself is held in trust. See *Mitchell I*, 445 U.S. at 541.

The Federal Circuit's attempt to impose a single common-law "trust" is incompatible with these widely varying arrangements derived from the Nation's long history in the administration of Indian affairs.

2. No statute or regulation requires the United States to disclose to Indian tribes privileged communications between government decisionmakers and their attorneys

In light of the Court's emphasis in *Navajo Nation I* and *II* on statutory duties, the absence of any statutory or regulatory duty that the Interior Department dis-

close privileged communications between the Secretary and government attorneys about the administration of statutes applicable to trust and other Indian property precludes importation of such an obligation based on generic common-law principles. There is no common-law right of access to the government's records or documents generally, and none of the statutes or regulations governing the Interior Department's functions in this area suggests that the type of material at issue in this case must be made available to Indian tribes.

a. Congress controls the use of government property under the Property Clause of the Constitution, which gives Congress exceptionally broad power to make rules respecting government property or to confer such power on federal agencies. U.S. Const. Art. IV, § 3, Cl. 2; see *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976). The actions of those agencies, like the Interior Department, are governed by federal statutes and regulations, see, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 937 (1986), not state law or judicially-fashioned common law, absent specific Congressional authorization, see, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 180 (1976) ("an authorization of state regulation is found when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous'") (citations and footnotes omitted). As a general matter, the Interior Department is authorized to release copies of official records, papers, or documents within the Department's custody only "when not prejudicial to the interests of the Government." 43 U.S.C. 1460. Other statutory provisions require disclosures of specific information to Indian tribes. See, *e.g.*, American Indian Trust Fund Management Reform Act of 1994 (1994 Trust Reform Act), 25 U.S.C. 162a(d),

4011 (enumerating responsibilities to tribes and individual Indians, including provision of quarterly statements of account performance and an annual audit letter); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1715(a), 1732(b)(2) (specifying that royalty accounting information regarding production, removal, or sale of oil or gas from leases on Indian lands must be made available to tribes).

The Federal Circuit described the 1994 Trust Reform Act, in particular, as "expressly recogniz[ing] the possibility of trust responsibilities outside the statute." Pet. App. 22a. That Act enumerates eight responsibilities (such as the disclosure obligations described in the parenthetical above) pertaining to the Secretary's administration of tribal trust funds, and states that the Secretary's responsibilities include "but are not limited to" those enumerated therein. 25 U.S.C. 162a(d). The latter clause—which is best read to refer to other statutory and regulatory requirements—does not license judicial imposition of common-law trust duties, including a generalized duty to disclose a broad range of information (including privileged information) to the tribe or individual Indian concerned, that would render superfluous the Act's specific disclosure obligations.

None of those statutes, including the 1994 Trust Reform Act, imposes any general duty to provide a tribe with information generally, much less the government's confidential communications with its own attorneys, even when those communications relate to management of Indian property. To the contrary, the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Tit. I, §§ 2-6, 96 Stat. 1976-1978 (28 U.S.C. 2415 note)—which the Federal Circuit failed to address—recognizes that privileges can be asserted to limit a tribe's access to confi-

dential government communications. That Act established a method for final resolution of certain pre-1966 damages suits brought by the government on behalf of tribes and individual Indians. See §§ 3-6, 96 Stat. 1977-1978; see generally *Oneida*, 470 U.S. at 241-244. Congress provided in that Act that "[u]pon the request of any Indian claimant, the Secretary shall, without undue delay, provide to such claimant any *nonprivileged* research materials or evidence gathered by the United States in the documentation of such claim." § 5(b), 96 Stat. 1978 (emphasis added).

b. The regulatory regime governing the obligations of federal agencies in administration of statutory trust functions pertaining to Indian assets likewise counsels against a duty to disclose attorney-client privileged communications. Interior Department regulations already require disclosure of certain information to Indian tribes. None of those regulations, however, requires disclosure of confidential communications between the government and its attorneys. The Interior Department, acting through the Office of Trust Fund Management (now part of the Office of the Special Trustee), must provide each tribe, *inter alia*, quarterly statements of account performance, 25 C.F.R. 115.801, 115.803, and, upon a tribe's request, other information about account transactions and balances, 25 C.F.R. 115.802. And, as noted above (pp. 29-30, *supra*), the regulations establish that records related to the government's trust function are the property of the United States. 25 C.F.R. 115.1000(a). By contrast, for common-law trusts, such records "do not belong to the trustee, but are part of the trust estate." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 961, at 3 (3d ed. 2010) (Bogert). For that reason, inap-

plicable to the government context, common-law "beneficiaries generally are entitled to access to all relevant information concerning the trust," including in some jurisdictions communications concerning trust administration between the trustee and his counsel. Bogert § 962, at 66.

Beyond those specific provisions, Indian tribes, like anyone else, must rely on FOIA for access to government records that neither pertinent statutes nor regulations otherwise require the Interior Department to disclose. And significantly, as noted above (p. 12, *supra*), Exemption 5, 5 U.S.C. 552(b)(5), would protect attorney-client privileged materials pertaining to tribal trusts from disclosure under FOIA.

c. It is Congress, pursuant to its exclusive authority over Indian affairs, U.S. Const. Art. I, § 8, Cl. 3, that defines the duties of the Interior Department (and the duties of the Treasury Department to the extent that Department may be involved) when it carries out statutorily-assigned functions relating to property held in trust for tribes. As this Court has stressed, "Congress possesses plenary power over Indian affairs." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This plenary power extends fully to Indian monies, limited only by constitutional protections for recognized property interests. See *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 83-84 (1977). Particularly where Congress has legislated comprehensively to address an issue, as it has done in the statutory provisions governing disclosure of government information and authorizing the Interior Department to issue regulation for that purpose, any latitude that courts might otherwise have had to craft common-law rules of decision is eliminated. Cf. *City of Milwaukee* v. *Illinois*, 451 U.S.

304, 315 n.8 (1981) ("the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law"); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)(when an act "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless").

3. Requiring disclosure of attorney-client privileged communications, especially in light of the government's potentially competing obligations, would chill the rendering of critical legal advice

Along with the Secretary's responsibilities to Indian tribes, the Secretary must comply with a host of other statutory and regulatory mandates concerning, *e.g.*, the public lands, threatened and endangered fish and wildlife species, and other natural resources that implicate tribes, reservations, or tribal sovereignty. See 43 U.S.C. 1457. Those obligations are sometimes in tension with a tribe's envisioned management of tribal trust assets. The fact that the United States, as a sovereign, must often represent varied interests in managing property rights does not eliminate its ability to protect the interests of Indians. See *Arizona* v. *California*, 460 U.S. 605, 626-627 (1983). Yet, in managing such potentially competing obligations, the Secretary must, if necessary, at times subordinate some of the beneficiaries' interests to the Secretary's other interests. See *Nevada*, 463 U.S. at 128. In *Nevada*, for example, the Court (in a res judicata decision) determined that the United States, as a sovereign, could litigate water rights on behalf of both Indian and competing non-Indian interests without

breaching any fiduciary duty to the tribe. *Id.* at 128, 135-138 & n.15. The Secretary's multiple responsibilities, implemented by various bureaus and offices within the Interior Department, heightens the need for agency officials to receive candid and confidential legal advice. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 391 (1981).

The Secretary's various duties are materially different from the duty of a private fiduciary at common law. In the event of a conflicting interest, a common-law trustee owes complete allegiance to the beneficiary. See Restatement (Third) of Trusts § 178; Restatement (Second) of Trusts § 170(1), at 364; Bogert § 543, at 217 (rev. 2d ed. 1980); see also 2A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 170, at 311 (4th ed. 1993) (fiduciary's duty of loyalty is "to administer the trust *solely* in the interest of the beneficiaries") (emphasis added). But as the Court observed in *Nevada*, the government "cannot follow the fastidious standards of a private fiduciary" in the Indian law setting. 463 U.S. at 128.

The Federal Circuit incorrectly dismissed *Nevada* as "not relevant" because the government in this case did not specifically argue that it "in fact had to balance competing interests, such as land or mineral rights, in the communications at issue here." Pet. App. 18a. That reflects too narrow a reading of *Nevada* and a flawed understanding of the role of the sovereign. Although the present phase of the litigation concerns trust funds rather than real property or natural resources, the government remains uniquely situated as a sovereign. See 1995 OLC Op. 5 ("The role of the government attorney is somewhat more complicated than that of a private attorney: that is, the government attorney may have a

higher obligation to 'do justice' and to correct public or societal wrongs, rather than simply to advocate the position of the attorney's client."); cf. *Berger* v. *United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."). Indeed, the Tribe itself argues (Br. in Opp. 14 n.2) that the same result should obtain regardless of whether a specific competing interest is at issue.

While perhaps not as overt as the competing water interests at issue in *Nevada*, the government balances a host of statutory and other sovereign obligations when managing trust funds. For example, if an individual Indian is indebted to a tribe, that tribe may obtain a tribal-court judgment against the individual Indian and attempt to enforce the judgment by attaching the individual's trust account. The Secretary—after taking into account the interests of individual Indian account holders, tribal account holders, and the tribal court system—would then have to decide whether to pay the tribal court judgment from the individual's account. This scenario is not just hypothetical: one of the documents required to be disclosed by the decisions below—a memorandum containing legal advice from the Regional Solicitor to an Assistant Area Director of the Bureau of Indian Affairs—addresses analogous circumstances. Pet. App. 74a (Doc. No. 37).

In any event, requiring the government, before it may be entitled to the privilege, to determine on a case-by-case or communication-by-communication basis whether it has balanced or will "balance competing interests" is unworkable. In order to be effective, the privilege must be predictable. See, *e.g.*, *Jaffee* v. *Redmond*,

518 U.S. 1, 18 (1996); *Upjohn*, 449 U.S. at 393. What constitutes a "specific competing interest" is not self-evident (especially from the *ex ante* perspective of agency personnel in need of guidance), and to what extent the government would have to show consideration of such an interest in a particular communication is equally uncertain. If government attorneys must engage in such an unpredictable and amorphous inquiry before determining that they and the decisionmakers they advise may rely on the privilege, that is "little better than no privilege at all." *Ibid.*; cf. *United States* v. *Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999) (suggesting that an uncertain privilege will result in "trustees shying away from legal advice regarding the performance of their duties," an outcome which "ultimately hurts beneficiaries"). Indeed, determining whether any competing obligation affects a particular trust-related action may be the very point of the attorney-client communication.

* * * * *

The Federal Circuit's decision, which abrogates the government's attorney-client privilege in the administration of laws affecting Indian property by importing rules governing private trustees at common law, cannot be reconciled with this Court's longstanding precedents distinguishing the United States as a sovereign from a common-law trustee, with the Court's precedents holding that the government's duties in this context are based on statutes and regulations not the common law, or with the established understanding of the role of government lawyers representing only the United States in Indian affairs. Reversal of that decision is needed to avoid undermining the ability of agency personnel to solicit, and government attorneys to provide, legal ad-

vice in the performance of their respective duties on behalf of the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

HILARY C. TOMPKINS
Solicitor
Department of the Interior

BRIAN C. TOTH
Attorney

FEBRUARY 2011

APPENDIX

1. 25 U.S.C. 162a provides, in pertinent part:

Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required

* * * * *

(d) Trust responsibilities of Secretary of the Interior

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

2. 25 U.S.C. 4011 provides:

Responsibility of Secretary to account for the daily and annual balances of Indian trust funds

(a) Requirement to account

The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title.

(b) Periodic statement of performance

Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify—

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) Annual audit

The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title, and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit.

3. 25 C.F.R. 15.502 provides:

Who owns the records associated with this part?

(a) The United States owns the records associated with this part if:

(1) They are evidence of the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part; and

(2) They are either:

(i) Made by or on behalf of the United States; or

(ii) Made or received by a tribe or tribal organization in the conduct of a Federal trust function under this part, including the operation of a trust program under Pub. L. 93-638, as amended, and as codified at 25 U.S.C. 450 *et seq.*

(b) The tribe owns the records associated with this part if they:

(1) Are not covered by paragraph (a) of this section; and

(2) Are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part.

4. 25 C.F.R. 115.1000(a) provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under this part, including the operation of a trust program pursuant to 25 U.S.C. 450f *et seq.*; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

5. 25 C.F.R 162.111 provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under 25 U.S.C. § 450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.

6. 25 C.F.R. 166.1000 provides:

Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under 25 U.S.C. § 450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAR 24 2011
OFFICE OF THE CLERK

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

STEVEN D. GORDON
Counsel of Record
SHENAN R. ATCITTY
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Respondent

49

QUESTION PRESENTED

Can the United States assert the attorney-client privilege against an Indian tribe suing it for mismanagement of tribal trust funds to withhold communications between the government and its attorneys concerning management of those funds when the communications do not involve any other governmental duty that competes with its fiduciary duty to manage the funds for the tribe's benefit?

TABLE OF CONTENTS

COUNTERSTATEMENT 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

A. The Evidentiary Privilege Issue Presented Here Is Governed By Fed. R. Evid. 501 10

B. The Government's Privilege Claim Finds No Support In Common Law 12

1. The government has a weaker claim to the attorney-client privilege than a private party 13

2. The fiduciary exception precludes any claim of attorney-client privilege in this case 15

C. The Fiduciary Exception Applies To The Government Like Other Trustees 17

1. The government acts as a fiduciary in managing Jicarilla's trust funds and its sovereign status does not diminish its fiduciary duties 18

2. Jicarilla is the "real client" of legal advice about the management of its trust funds 24

3. As a trustee, the government has a fiduciary duty to disclose legal advice about trust fund management to Jicarilla 28

CONCLUSION 35

APPENDIX 1a

TABLE OF AUTHORITIES

CASES	PAGES
Bd. of County Comm'rs v. Seber, 318 U.S. 705 (1943)	28
Berger v United States, 295 U.S. 78 (1935)	14
Bland v. Fiatallis N. America, Inc., 401 F.3d 779 (7th Cir. 2005)	16
Cavanaugh v. Wainstein, Civil Action No. 05-123 (GK), 2007 WL 1601723 (D.D.C. June 4, 2007)	17
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)	32
Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001)	33, 34
212 F.R.D. 24 (D.D.C. 2002)	16
Colucci v. Agfa Corp. Severance Pay Plan, 431 F.3d 170 (4th Cir. 2005)	27
Cramer v. United States, 261 U.S. 219 (1923)	31
Dep't of the Interior v. Klamath Water Users Protective Assoc., 532 U.S. 1 (2001)	32, 33
Dir., Office of Workers Comp. Programs v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995)	21

Federal Election Com'n v. Wisconsin Right To Life, Inc., 551 U.S. 449 (2007) 12

Fisher v. United States, 425 U.S. 391 (1976) ... 14

Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir.1970) 26

Heckman v. *United States*, 224 U.S. 413 (1912) 20, 21

Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986 (9th Cir. 2005) 22

In re A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002) 15

In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005) 7, 15

In re Grand Jury Proceedings #5, 401 F.3d 247 (4th Cir. 2005) 27

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) 15

In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) 14, 15

Lincoln v. Vigil, 508 U.S. 182 (1993) 18

Morton v. Ruiz, 415 U.S. 199 (1974) 31

Nevada v. United States, 463 U.S. 110 (1983) 22, 23

NLRB v. Amax Coal Co.,
453 U.S. 322 (1981) 19

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) 13

Osage Nation and/or Tribe of Indians of Oklahoma v. United States,
66 Fed. Cl. 244 (2005) 16

Poafpybitty v. Skelly Oil Co.,
390 U.S. 365 (1968) 21

Quintel Corp., N.V. v. CitiBank, N.A.,
567 F. Supp. 1357 (S.D.N.Y. 1983) 16

Riggs Nat'l Bank v. Zimmer,
355 A.2d 709 (Del. Ch. 1976) 25, 26

Seminole Nation v. United States,
316 U.S. 286 (1942) 18, 32

Shoshone Indian Tribe of the Wind River Reservation v. United States,
364 F.3d 1339 (Fed. Cir. 2004) 17
Order, Nos. 458a-79 L and 459a-79 L (Ct. Fed. Cl. May 16, 2002) 16

Springfield v. Kibbe,
480 U.S. 257 (1987) 8

Steagald v. United States,
451 U.S. 204 (1981) 8

Trammel v. United States,
445 U.S. 40 (1980) 11, 12

United States v. Candelaria,
271 U.S. 432 (1926) 20, 21

United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) 18

United States v. Mason,
412 U.S. 391 (1973) 32

United States v. Mett,
178 F.3d 1058 (9th Cir. 1999) 7, 16

United States v. Minnesota,
270 U.S. 181 (1926) 21

United States v. Mitchell,
463 U.S. 206 (1983) 19, 20, 30, 31

United States v. Navajo Nation:
537 U.S. 488 (2003) 9
129 S. Ct. 1547 (2009) 9, 10, 30

United States v. Weber Aircraft Corp.,
465 U.S. 792 (1984) 11

United States v. White Mtn. Apache Tribe,
537 U.S. 465 (2003) 32

Upjohn Co. v. United States,
449 U.S. 383 (1981) 13, 14

Varity Corp. v. Howe,
516 U.S. 489 (1996) 30, 31

Wachtel v. Health Net, Inc.,
482 F.3d 225 (3d Cir. 2007) 26, 28

STATUTES AND RULES

25 U.S.C. § 161a 1, 7, 17, 19

25 U.S.C. § 162a 1, 7, 19, 34

Act of December 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329 33

American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 162a(d) 5, 34

Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 (codified at 28 U.S.C. § 2415 note) 29

Indian Tucker Act, 28 U.S.C. § 1505 ..... 1, 10

Tucker Act, 28 U.S.C. § 1491 ..... 1, 10

Fed. R. Evid. 501 ..... 3, 6, 10, 11, 29

OTHER MATERIALS

Brief for Petitioners, *Dep't of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1 (2001) (No. 99-1871) 32

Brief for the United States, *United States v. Mason*, 412 U.S. 391 (1972) (No. 72-654), 1973 WL 172578 33

Cohen's Handbook of Federal Indian Law, § 5.03[3][b] (Nell Jessup Newton et al. eds., 2005 ed.) 34

Comm. on Gov't Operations, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499 (1992) 33

H.R. Rep. No. 103-778 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467 ..... 17, 34

Office of Mgmt. & Budget, Exec. Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2000* (1999) 20

Restatement (Third) of The Law Governing Lawyers (2000):
§ 16 27
§ 51 27
§ 84 ..... 7, 15

Restatement (First) of Trusts § 173 (1935) 29

Restatement (Second) of Trusts § 173 (1959) ... 29

Restatement (Third) of Trusts § 56 (2003) 23

Restatement (Third) of Trusts (2007):
§ 78 24
§ 79 ..... 8, 24
§ 82 ..... 7, 9, 15, 24, 29, 34

S. Rep. No. 93-1277 (1974) 11

Unif. R. Evid. 502 14

24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5475 (1986) 13

26 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5642 (1992) 27

COUNTERSTATEMENT

1. In 2002, the Jicarilla Apache Nation (Jicarilla) commenced a breach of trust action against the United States in the Court of Federal Claims (CFC). Insofar as relevant here, the action seeks monetary damages for the government's alleged mismanagement of funds held in trust by the United States for Jicarilla.

Jicarilla sued under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, both of which vest the CFC with jurisdiction over claims against the government that are founded upon the Constitution, laws, treaties, or contracts of the United States. The complaint alleges that the government's mismanagement of Jicarilla trust funds violated various laws, including 25 U.S.C. §§ 161a and 162a, which govern the management of funds held in trust by the United States for the benefit of an Indian tribe.

2. The litigation was stayed for more than five years while the parties participated in an alternative dispute resolution (ADR) process. The parties engaged in large-scale document production, during which the government withheld a number of documents as privileged. Pet. App. 25a.

In 2008, at Jicarilla's request, the case was restored to an active litigation track. The CFC divided the case into phases for trial and established a discovery schedule. The first phase addresses the government's mismanagement of Jicarilla's trust accounts from 1972 through 1992, which had been

the focus of the ADR proceedings. Pet. App. 26a. Jicarilla alleges, among other things, that the government failed to invest its trust funds properly. Pet. App. 25a.

Jicarilla filed a motion to compel production of 226 documents withheld by the government during the ADR process based on claims of attorney-client privilege, attorney work-product, and the deliberative process privilege. The government withdrew its deliberative process privilege claims and agreed to produce 71 of the documents but maintained its claims as to the remainder, which the government delivered to the CFC for *in camera* review. Pet. App. 26a.

3. In July 2009, the CFC ruled on the parties' discovery motions and granted Jicarilla's motion to compel in relevant part. Pet. App. 24a-90a. The CFC, like all the federal courts that previously addressed the issue, concluded that the "fiduciary exception" to the attorney-client privilege required the government, as a fiduciary, to disclose to an Indian beneficiary communications relating to the management of trust funds. Pet. App. 44a. (The CFC did not, however, apply the fiduciary exception to the government's claims of work-product privilege. App. 47a).

The CFC explained that courts have advanced two principal justifications for the "fiduciary exception." The first is that the fiduciary obtains the legal advice as a proxy for the beneficiary. App. 41a. The second is that the exception derives from the fiduciary's duty to keep the beneficiary informed of issues involving trust administration. Pet. App. 42a.

The CFC concluded that there is nothing about the fiduciary relationship between the United States and Jicarilla that renders the "fiduciary exception" inapplicable to the government. Pet. App. 45a. Accordingly, the CFC ordered the production of 75 of the documents at issue. Pet. App. 50a-63a, 69a, 71a-84a.

4. The government petitioned the Federal Circuit for a writ of mandamus. The Federal Circuit granted a temporary stay but ultimately denied the petition. Pet. App. 1a-23a. It held that "the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." Pet. App. 1a-2a.

The Federal Circuit began by noting that, pursuant to Fed. R. Evid. 501, it interprets privileges on a case-by-case basis according to common law principles. Pet. App. 7a. The court traced the history and development of the common law fiduciary exception to the attorney-client privilege. It observed that the exception is well established in federal jurisprudence and that federal trial courts previously had applied this exception to the United States in at least three Indian trust cases. Pet. App. 9a-14a.

The Federal Circuit concluded that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify

applying the fiduciary exception." Pet. App. 14a. It cited decisions of this Court and a number of statutes that establish or recognize the existence of a trust relationship between the United States and the Indian people. Pet. App. 15a-16a. The court found that the two principal justifications for the fiduciary exception both apply in this case. First, Jicarilla was the "real client" of the advice provided to the Department of the Interior (Interior) about how to manage tribal trust funds. Pet. App. 15a. Second, as a trustee, the United States has a fiduciary duty to disclose information related to trust management to the beneficiary tribe, including legal advice about how to manage trust funds. Pet. App. 21a.

The Federal Circuit considered and rejected the government's various arguments about why these rationales should not apply to it. The court acknowledged that the government may sometimes be required to balance its fiduciary duties to tribes with other statutory duties. In this case, however, there was no allegation that the documents at issue involve any such balancing of competing interests. The court noted that this is the trust funds phase of the case and does not involve the management of assets such as land or mineral rights, where the government might have other statutory duties. The court reserved the question whether the fiduciary exception applies to communications in which a specific competing interest actually was considered. Pet. App. 18a-19a.

The court also rejected the government's argument that the fiduciary exception is inapplicable because government attorneys are paid out of congressional appropriations rather than the trust

corpus. The court saw no reason why use of public funds to pay for legal advice about trust management should bar the tribe from accessing that advice. Pet. App. 19a-20a.

Nor did the court accept the government's argument that applying the fiduciary exception would impair the Secretary of the Interior's ability to obtain confidential legal advice. It noted that this same concern could be stated by any trustee, public or private. and concluded that this concern is outweighed by the rationales supporting application of the fiduciary exception. Pet. App. 20a.

Finally, the court rejected the argument that Interior's duty to disseminate information to tribes about their trust funds is limited to what Congress required in the American Indian Trust Fund Management Reform Act of 1994 (Indian Trust Reform Act). The court found this argument "completely without merit" because the Act explicitly recognizes the possibility of additional trust responsibilities beyond those enumerated therein. Pet. App. 21a-22a.

5. The government filed a petition for rehearing and for rehearing en banc which the Federal Circuit denied on April 22, 2010. Pet. App. 91a-92a. Meanwhile, the CFC set a new deadline for production of the documents and, on February 19, 2010, issued a protective order that preserves the government's privilege claim and prevents disclosure to third parties until the government has exhausted all of its appellate remedies. Pet. App. 93a-97a. The government thereafter produced the documents to Jicarilla pursuant to this order.

SUMMARY OF ARGUMENT

The government asks the Court to ignore the Federal Rules of Evidence and exempt it from the well-established principle that, in breach of trust litigation, a trustee cannot assert the attorney-client privilege against the beneficiary with respect to the legal advice it has received regarding the management of trust funds. Its arguments are unpersuasive.

1. The Federal Rules of Evidence control determinations of privilege in federal courts and provide that they "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. The government fails to acknowledge this rule. Indeed, it urges the Court to contravene the rule by arguing that "the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law." Br. 30.

2. The government relies upon the common law (not any statute or regulation) in arguing that it has an attorney-client privilege. But common law provides no support for the government's argument that it deserves a broader and stronger privilege than do private trustees. To the contrary, as the United States itself has argued elsewhere, "the attorney-client privilege in the government context is weaker than in its traditional form." *In re Grand Jury Investigation*, 399 F.3d 527, 533 (2d Cir. 2005).

3. The fiduciary exception precludes any trustee from asserting the attorney-client privilege against the beneficiary with respect to communications regarding trust administration. *See Restatement (Third) of The Law Governing Lawyers* § 84 (2000); *Restatement (Third) of Trusts* § 82 cmt. f (2007). This exception is "black letter" law and the government itself has invoked the exception in litigation involving private fiduciaries. *See United States v. Mett*, 178 F.3d 1058, 1061, 1064 n.9 (9th Cir. 1999).

There are two justifications for the exception: (1) the fiduciary acts as a proxy for the beneficiary who is the "real client" of the advice, *i.e.* because the advice is sought to serve the beneficiary's interest, the beneficiary is entitled to it; and (2) the fiduciary has a duty to disclose all information related to trust management to the beneficiary. These rationales apply to the government as well as private trustees. *See* Pet. App. 14a-21a.

4. Congress unequivocally has made the government a fiduciary when it manages tribal trust funds. The applicable statutes, 25 U.S.C. §§ 161a and 162a (App. 1a-3a), could not be clearer that tribal funds are "held in trust by the United States" and are to be managed as such. Although the government, as a sovereign, may have broader responsibilities and powers than a private trustee, its sovereign status does not diminish its fiduciary duty to manage tribal trust funds solely for the benefit of the tribe. Nor does its sovereign status entitle the government to withhold from a tribal beneficiary information about how it has managed the tribe's trust funds.

5. The government contends that it sometimes has other responsibilities that may conflict with the interests of its Indian beneficiaries, but that issue is not presented here. The government did not allege below that any such conflict exists and the Federal Circuit reserved the question whether the fiduciary exception applies to communications that do consider competing interests.[1] Moreover, the government has no other duties that compete with its obligation to manage Indian trust funds solely for the benefit of the Indians. And the existence of a competing duty would not undercut the fiduciary exception in any event. The need for transparency about trust management is even greater where the trustee has divided loyalties or duties. *See Restatement (Third) of Trusts* § 79 cmt. g (2007) (emphasizing the importance of the trustee's communication with beneficiaries who have competing interests).

6. The government attacks a straw man in arguing that the Federal Circuit's ruling treats

---

[1] Not until it sought review by this Court did the government first suggest that one of the 75 documents at issue in this case might involve a competing interest. Pet. at 29. Because this question was not raised before or decided by the courts below, the Court ordinarily would not review it. *See Springfield v. Kibbe*, 480 U.S. 257 (1987) "The Government . . may lose its right to raise factual issues . before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Steagald v. United States*, 451 U.S. 204, 209 (1981).

tribes (and not just the government) as the client of government attorneys. The fiduciary exception only applies in the absence of an attorney-client relationship between the trustee's counsel and the beneficiary. Were the beneficiary the actual client of the attorney, resort to the exception would be unnecessary. The exception applies because the beneficiary is considered the "real client" of the legal advice about the management of its trust funds: the purpose of the advice is to serve the beneficiary's interests. The government and its officials who obtained the advice have no stake in substance of the advice, beyond their trustee role.

7. Under long-established common law principles, a trust beneficiary is entitled to "such information as is reasonably necessary to enable [it] to prevent or redress a breach of trust and otherwise to enforce [its] rights under the trust." *Restatement (Third) of Trusts* § 82 cmt. a(2). This includes legal advice provided to the trustee about management of the trust. *Id.* cmt. f. Congress has not exempted the government from these principles. Nor has it authorized the government to withhold such information from Indian trust beneficiaries.

8. The government's reliance on the *Navajo Nation* decisions[2] to disclaim any duty of disclosure not spelled out by statute or regulation is misplaced. Those decisions address the CFC's jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, both of which require a

---

[2] *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009) (*Navajo II*); *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*).

claim based on a statutory or regulatory obligation. In that context, principles of trust law cannot substitute for a statutory or regulatory obligation. *See Navajo II*, 129 S. Ct. at 1551-52. But this case does not involve the CFC's jurisdiction. Rather, it involves what evidence is available to prove a breach of trust claim where the jurisdictional requisites of the Tucker Act or Indian Tucker Act already have been satisfied. Pursuant to Fed. R. Evid. 501, this evidentiary issue is governed by common law principles.

ARGUMENT

A. The Evidentiary Privilege Issue Presented Here Is Governed By Fed. R. Evid. 501

The issue presented in this case is whether an Indian tribe suing the government for mismanagement of its trust funds is entitled to discover and use as evidence the legal advice provided to the government about the management of those funds.[3] This issue is controlled by Fed. R. Evid. 501, which provides that "the privilege of a . . . government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

In enacting Rule 501, Congress considered and rejected a set of proposed privilege rules that had

---

[3] There is no issue in this case about the CFC's jurisdiction to adjudicate Jicarilla's claims. Nor is there yet any issue about the government's liability, which remains to be decided at trial.

defined nine specific privileges and, instead, mandated continued use of the common law. *See Trammel v. United States*, 445 U.S. 40, 47 (1980). The House of Representatives amended article V of the proposed Rules to eliminate all of the specific rules on privileges. The Senate concurred "with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply . . . ." S. Rep. No. 93-1277, at 11 (1974). "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984).

The government conspicuously fails to cite Rule 501 anywhere in its brief. The rule belies its arguments that the Federal Circuit erred by "imposing judicially fashioned common-law rules and concepts on the United States" (Br. 29) and that "the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law." Br. 30. To the contrary, the Federal Circuit correctly followed Congress' mandate in Rule 501 by applying common law principles to resolve the privilege issue presented here. The government cannot exempt itself from Rule 501 by simply disregarding it.

Furthermore, in its attempt to bypass Rule 501, the government takes an internally inconsistent position. The government argues that its disclosure obligations are governed solely by statute and regulation, not by common law. But no statute or regulation confers an attorney-client privilege on the

government. The government relies upon the common law in arguing that it has such a privilege. Thus, the government's position is that the Court should give it the benefit of the common law attorney-client privilege, but ignore the common law exception to that privilege. "This 'heads I win, tails you lose' approach cannot be correct." *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 471 (2007). The government cannot selectively invoke and disregard the common law to suit its own advantage.

B. The Government's Privilege Claim Finds No Support In Common Law

Privileges "must be strictly construed and accepted only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotations omitted). The government contends that it deserves a broader, stronger attorney-client privilege than do private fiduciaries. But it has less need for, and claim to, an attorney-client privilege than a private party. The fiduciary exception applies to the government like private trustees and precludes assertion of the attorney-client privilege against an Indian trust beneficiary.

1. The government has a weaker claim to the attorney-client privilege than a private party

Although it is well-established that corporations and individuals have an attorney-client privilege, this Court has never addressed the extent to which the privilege applies to communications between government officials and attorneys.[4] Indeed, "[i]t is far from clear that the common law attorney-client privilege could be claimed by governments . . . ." 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5475, at 124 (1986). The Executive Branch's legitimate interests in confidentiality are protected by distinct privileges, such as executive privilege, that are specifically tailored to the workings of government and that are unavailable to private persons and entities. There is a substantial argument that claims for governmental secrecy should all be adjudicated in the context of these privileges. *See id.* at 127.

The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United*

---

[4] In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Court ruled that Exemption 5 of the Freedom of Information Act includes documents subject to the attorney work-product privilege. In support of this ruling, the Court cited legislative history that mentioned both work-product and the attorney-client privilege. *Id.* at 154.

States, 449 U.S. 383, 389 (1981). The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). But this rationale for the privilege is not compelling when applied to the government.

While government officials doubtless have a legitimate need for legal advice as they go about their business, it does not follow that their consultations with counsel should be privileged in order to promote the public interest in the observance of law.[5] Government officials and attorneys are supposed to serve the public interest rather than any private interest. "Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998); *see also Berger v. United States*, 295 U.S. 78, 88 (1935). "The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive [as precedent for applying the attorney-client privilege to the government as an

---

[5] The Uniform Rules of Evidence, for example, preclude any attorney-client privilege for communications between a public officer or agency and its lawyers "unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest." Unif. R. Evid. 502. Under this approach, the government could not assert any attorney-client privilege here even without considering the fiduciary exception.

organization]." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997). The United States has taken the position in other cases that "the attorney-client privilege in the government context is weaker than in its traditional form." *In re Grand Jury Investigation*, 399 F.3d at 533.[6]

2. The fiduciary exception precludes any claim of attorney-client privilege in this case

Whatever attorney-client privilege the government may possess in other contexts, the fiduciary exception precludes assertion of the privilege here. The fiduciary exception is firmly established in common law. The Federal Circuit traced its development back to 1855 and noted that it has been recognized by at least five circuits. App. 9a-12a. It is "black letter" law in the *Restatement (Third) of The Law Governing Lawyers* § 84, and *Restatement (Third) of Trusts* § 82 cmt. f. The government, itself, has invoked the exception in litigation involving private fiduciaries. *See Mett*, 178 F.3d at 1061, 1064 n.9.

---

[6] It appears that the federal government thus far has limited this argument to criminal cases in which it is challenging an assertion of attorney-client privilege by a state government. *See In re Grand Jury Investigation, supra; In re A Witness Before the Special Grand Jury 2000-2*, 288 F 3d 289, 293 (7th Cir. 2002). This argument has twice been successfully asserted against the federal government by an Independent Counsel *See In re Lindsey*, 158 F.3d 1263, 1278; *In re Grand Jury Subpoena Duces Tecum*, 112 F 3d 910, 921. But the argument is equally applicable here, where the issue is whether the government has breached its fiduciary duty.

The fiduciary exception rests on two foundations. First, the fiduciary acts as a proxy for the beneficiary who is the "real client" for whose benefit the advice was sought. Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary. Pet. App. 13a-14a. In sum, "because of the mutuality of interest between the parties, the faithful fiduciary has nothing to hide from his beneficiary." *Quintel Corp., N.V. v. CitiBank, N.A.*, 567 F. Supp. 1357, 1363 (S.D.N.Y. 1983). Put another way, "the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty." *Bland v. Fiatallis N. America, Inc.*, 401 F.3d 779, 787 (7th Cir. 2005).

The Federal Circuit concluded correctly that "[t]he United States' relationship with the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception." Pet. App. 14a. Every other court to have considered this issue has reached the same conclusion. Over the past decade, federal courts uniformly have applied the fiduciary exception in Indian trust cases. *See* Pet. App. 85a-90a (Order, *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, Nos. 458a-79 L and 459a-79 L (CFC May 16, 2002)); *Cobell v. Norton*, 212 F.R.D. 24, 27-29 (D.D.C. 2002); *Osage Nation and/or Tribe of Indians of Oklahoma v. United States*, 66 Fed. Cl. 244, 247-53 (2005). The fiduciary exception also has been applied in other contexts where the government manages private funds as a trustee. *See Cavanaugh v. Wainstein*, Civil Action No. 05-123 (GK), 2007 WL 1601723, at *9 (D.D.C. June 4, 2007) (fiduciary exception

recognized in breach of fiduciary duty action against members of the Federal Retirement Thrift Investment Board).[7]

C. The Fiduciary Exception Applies To The Government Like Other Trustees

Applying the fiduciary exception to the government simply treats it like other trustees. Indian beneficiaries are equally deserving of, and entitled to, the legal advice provided to their fiduciary regarding the management of their trust funds as are beneficiaries of private trusts. "The Indian Tribes, as domestic dependent nations, were subjected to the imposition of the trustee-beneficiary relationship and have become reliant upon their trustee to carry out trustee responsibilities." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). "As early as 1929 the United States recognized its fiduciary responsibilities for Indian trust funds, and enacted 25 U.S.C. 161a, requiring the Secretary to invest funds held in trust by the Secretary on behalf of Indian tribes." H.R. Rep. No. 103-778, at 11 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3470.

Nonetheless, the government seeks to withhold from Indian beneficiaries the legal advice it has received regarding the management of the Indians' trust funds. It contends that the rationales for the fiduciary exception are vitiated in Indian trust cases

---

[7] The Board manages the Thrift Savings Plan -- the largest defined contribution plan in the world -- for federal employees and members of the uniformed services.

because (1) unlike private trustees, it manages tribal trust property as a sovereign and sometimes may have other responsibilities that conflict with tribal interests, and (2) no statute or regulation requires it to communicate all relevant information about trust management to Indian tribes and no such common law duty can be imposed on it. These contentions do not withstand scrutiny.

1. The government acts as a fiduciary in managing Jicarilla's trust funds and its sovereign status does not diminish its fiduciary duties

It is undisputed here that the government held Jicarilla's money in trust and managed it for the benefit of Jicarilla. The government admitted the allegations in paragraph 7 of the first amended complaint that "the United States held in trust for Plaintiff proceeds derived from . . . uses of its land . . . . These monies were held in trust and managed exclusively by the United States in the United States Treasury for Plaintiff's benefit."

a. "[T]he law is 'well established that the Government in its dealing with Indian tribal property acts in a fiduciary capacity.'" *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987)); *see also Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (holding that government owes a "distinctive obligation of trust" to Indian tribes and must adhere to "the most exacting fiduciary standards" in its dealings with Indian tribes). Further, "where the Federal Government takes on or has control or supervision

over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*) (internal quotations and citation omitted).

b. Moreover, Congress has expressly declared that tribal funds like Jicarilla's are "held in trust by the United States" and are to be managed as such. 25 U.S.C. §§ 161a, 162a (App. 1a-3a). In *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), this Court construed a statute providing that the assets of union welfare funds be "held in trust." It reasoned that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* at 329. Thus, "[c]ourts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *Id.* at 330.

The government's suggestion that Sections 161a and 162a create merely a "bare trust" placing only limited responsibilities on it (Br. 34) is specious. These provisions "clearly give the Federal Government full responsibility to manage Indian [funds] for the benefit of the Indians." *Mitchell II*, 463 U.S. at 224. Indeed, they establish "pervasive federal control" over management of Indian funds. *Id.* at 225 n.29. Nothing in these provisions evinces

any congressional intent to absolve the government from traditional fiduciary duties in the course of managing these private funds.[8]

c. The government contends that, unlike private trustees, it has distinctly sovereign interests in the administration of laws concerning tribal properties. But none of the cases cited by the government supports the proposition that, as a sovereign, it owes a lesser fiduciary duty to Indian tribes where it manages trust assets. Rather, these cases establish that the government, as a sovereign, has standing to protect Indian property interests even when the property is not formally held in trust by the government.

Heckman v. *United States*, 224 U.S. 413, (1912) and *United States v. Candelaria*, 271 U.S. 432 (1926) both involved property that was not held in trust by the United States. *Heckman* concluded that the government as a guardian had standing to act "on behalf of" the Indian owners. 224 U.S. at 444. Similarly, *Candelaria* held that the United States, as guardian of an Indian pueblo, was not barred by

---

[8] The government does not include the transactions of tribal trust funds in the Federal budget because the funds are owned by the tribes and held and managed in a fiduciary capacity by the government on the tribes' behalf. The government treats the Thrift Savings Fund, which holds assets for federal employees who participate in the Thrift Savings Plan, in the same fashion. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2000*, at 339-40 (1999).

judgments in prior suits, to which it was not a party, from suing to quiet title to pueblo lands.[9]

In *United States v. Minnesota*, 270 U.S. 181, 194 (1926), the United States sued Minnesota to cancel certain federal land patents made to the state because those lands previously had been appropriated or set aside for a tribe. The state challenged the standing of the United States, alleging that the Indians were the real party in interest. The Court rejected this argument, ruling that the government had a real and direct interest in the matter which arose "out of its guardianship over the Indians, and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations, and in both aspects the interest is one which is vested in it as a sovereign." 270 U.S. at 194.

In sum, these cases establish that the government, as a sovereign, sometimes can do more than a private trustee could to protect Indian interests. But they provide no support for the argument that, where the government holds tribal trust funds in a traditional trust arrangement, it owes lesser fiduciary duties -- including the duty to share relevant legal advice -- to the tribal beneficiary than would a private trustee.

---

[9] *See Dir., Office of Workers Comp. Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 133 (1995) (*Heckman* held that the government's status as guardian confers standing to represent the interests of Indians); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) ("The obligation and power of the United States to institute . . . litigation to aid the Indian in the protection of his rights in his allotment were recognized in [*Heckman* and *Candelaria*].")

d. The government, citing *Nevada v. United States*, 463 U.S. 110 (1983), argues that it must manage potentially competing obligations that may require it to subordinate an Indian trust beneficiary's interests to other interests. In *Nevada*, the government had represented Indian tribes in litigation even though Congress had obliged it to represent other interests as well. The Court ruled, in essence, that "[t]he mere existence of a formal 'conflict of interest' does not deprive the United States of authority to represent Indians in litigation, and therefore to bind them as well." *Id.* at 145 (Brennan, J., concurring).

But *Nevada* does not hold or suggest that the rules applicable to private trustees should not generally be applied to the Government. To the contrary, the Court acknowledged "[i]t may be that where only a relationship between the Government and the Indian tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Id.* at 142 (emphasis added).

Nevada's import is that "[t]he government may satisfy a range of statutory responsibilities while still honoring its trust obligations to Indians." *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 993 (9th Cir. 2005) (citing *Nevada*, 463 U.S. at 128, 142-43). The record in *Nevada* did not establish that the government's fiduciary duties had been affected by its representation of additional interests. Rather, "[t]he record suggest[ed] that the BIA [Bureau of Indian Affairs] alone may have made the decision not to press claims for a [tribal] fishery water right,

for reasons which hindsight may render questionable, but which did not involve other interests represented by the Government." 463 U.S. at 135 n.15. Nor did the Court suggest that the government could escape liability if it had breached its fiduciary duties. The Court noted that, "[i]f, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties." *Id.* at 144 n.16.

Nevada is inapposite here because, as the Federal Circuit noted, this case "involves only the management of accounts, not of other assets such as land or mineral rights, where the Secretary of the Interior might have other statutory duties." Pet. App. 18a-19a. There are no competing statutory duties that temper the government's fiduciary obligation to manage and invest Indian trust funds for the sole benefit of the Indian beneficiary. That issue is not presented here.[10]

Moreover, the applicability of the fiduciary exception would not be affected in those exceptional situations where the government does have another obligation that competes with its fiduciary duties to Indians. To the contrary, the need for transparency

---

[10] The government now suggests that one of the 75 documents at issue does involve competing interests because it addresses a decision by the Interior Secretary whether to permit an individual Indian's trust account to be levied upon to pay a tribal court judgment against that individual. Br 43. But permitting a lawful levy upon a trust account does not conflict with the fiduciary duty to manage and invest the trust account for the benefit of the beneficiary *See Restatement (Third) of Trusts* § 56 (2003). The government did not advance this meritless argument in the courts below.

is even greater in those circumstances. Whenever a trust has two or more beneficiaries or purposes, the trustee may be faced with conflicting duties to various beneficiaries with competing economic interests, in which event the trustee has a duty of impartiality in balancing those duties. *See Restatement (Third) of Trusts* § 79 & cmt. b (2007). Such conflicting duties do not diminish the trustee's obligation to furnish information to the beneficiaries. *Id.* cmt. d. Rather, they underscore "the importance of the trustee's communication with beneficiaries." *Id.* cmt. g.

Similarly, there are some situations where a common law trustee does not owe undivided loyalty to a beneficiary. In those situations, the trustee still has a duty to act fairly, in good faith, prudently, and in the interest of the beneficiaries. *See Restatement (Third) of Trusts* § 78 cmt. c. In all of these situations, although the trustee may have conflicting duties or loyalties, the trustee still has a duty to furnish the beneficiary with information concerning the administration of the trust, including legal advice received by the trustee. *See id.* § 82 & cmt. f.

2. Jicarilla is the "real client" of legal advice about the management of its trust funds

The government argues at great length that an Indian tribe cannot be the client of the Attorney General and other government attorneys. This is a red herring that misconstrues the fiduciary exception and its "real client" rationale. Were the beneficiary to be deemed the actual client of the trustee's attorney, resort to the fiduciary exception

would be unnecessary. Application of the fiduciary exception presupposes that there is no attorney-client relationship between the attorney and the beneficiary. The "real client" concept focuses, instead, on the substance of the legal advice at issue and for whose benefit it is given. If the purpose of the advice is to serve the interests of the trust beneficiary, then the beneficiary is entitled to disclosure of the communications at issue. But the beneficiary does not thereby become the client of the attorney.

a. The seminal decision in *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), articulated the "real client" concept as follows: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. . . . The very intention of the communication is to aid the beneficiaries." *Id.* at 713-14. Thus, "[t]he policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust." *Id.* at 714.

Riggs focused on principles of trust law, but application of the fiduciary exception has not been limited to the trust context. Even before *Riggs* was decided, the Fifth Circuit held that, in a shareholder action, legal advice given to corporate managers by corporate counsel for the benefit of the corporation is not privileged. *See Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). The court concluded that "when all is said and done the management is not managing for itself," but rather on behalf of the

shareholders. *Id.* at 1101. "Thus, of central importance in both *Garner* and *Riggs* was the fiduciary's lack of a legitimate personal interest in the legal advice obtained." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232 (3d Cir. 2007).

Plainly, the "real client" concept applies to the documents at issue here. The purpose of seeking legal advice about the management of Indian trust funds was to aid the Indian beneficiaries. The government officials who obtained this advice had no personal stake in it. Accordingly, just as in *Riggs*, the policy of full disclosure in the trustee-beneficiary relationship outweighs any need for confidential communications between the government officials and their attorneys.

b. The government attacks a straw man by arguing that its attorneys represent the United States, not tribes, and that the circuit court's decision creates professional ethics problems for government attorneys. Jicarilla has never argued, and the Federal Circuit did not hold, that Jicarilla is the actual client of government attorneys advising federal officials regarding the management of trust monies. Indeed, it is well established that counsel for a trustee represents the trustee and not the beneficiary. "An attorney who advises his clients of their fiduciary obligations does not constructively become the beneficiary's representative." *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 180 (4th Cir. 2005). It is true that "[s]ometimes a client's duties to other persons, for example as a trustee or class representative, may impose on the lawyer similar consequential duties." *Restatement (Third) of The Law Governing Lawyers* § 16 cmt. c (2000)

(emphasis added). But this does not transform those other persons into clients of the attorney. *See id.* § 51(4) (discussing circumstances under which a lawyer for a trustee owes a duty of care to the beneficiary as a nonclient).

This case involves an issue of evidentiary privilege, not the professional responsibilities of government counsel.[11] The issue is whether the government-trustee, *i.e.* the client, can assert the attorney-client privilege against the trust beneficiary. This issue affects the client, not the attorney, because the privilege -- if it exists -- belongs to the client. *See, e.g., In re Grand Jury Proceedings #5*, 401 F.3d 247, 250 (4th Cir. 2005). The Federal Circuit ruled that the government-trustee cannot assert the privilege against Jicarilla. It did not purport to create an attorney-client relationship between government counsel and Jicarilla, nor did it impose any professional obligations upon government attorneys.

c. Finally, the fact that government attorneys are paid with public funds rather than from the trust corpus, and that the government owns the records reflecting communications with its attorneys, are of no import.[12] In some cases involving private

---

[11] "[T]he rationale for the [attorney-client] privilege and its doctrinal details are derived entirely from the law of evidence, not from the substantive law of attorney-client confidences." 26 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5642, at 291 (1992).

[12] It can be argued that Indian tribes have already "paid" for the government's trust services by ceding most of their lands to the United States. As this Court noted, "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them a[] . . . dependent people,

trustees, the source of payment may indicate for whose benefit the legal advice was being sought. *See Wachtel*, 482 F.3d at 235-36. But the use of public funds to pay government counsel does not alter the fact that their legal advice about the management of Indian trust funds was sought to aid the trust beneficiary.

3. As a trustee, the government has a fiduciary duty to disclose legal advice about trust fund management to Jicarilla

The Federal Circuit correctly ruled that the United States has a fiduciary duty to disclose information related to trust fund management to Jicarilla, including legal advice about how to manage trust funds. The government argues that "the disclosure of information by government agencies is governed by statute and regulation, not judicially fashioned notions drawn from the common law" (Br. 30), but this argument fails for multiple reasons.

a. First, as noted above, the government's argument ignores Fed. R. Evid. 501, which provides explicitly that issues of evidentiary privilege in federal courts are "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

At common law a trustee must disclose to a beneficiary legal advice obtained about administering the trust. This obligation has been

---

needing protection . . . Of necessity the United States assumed the duty of furnishing that protection . . ." *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)

recognized in all three Restatements of Trusts. *See Restatement (First) of Trusts* § 173 (1935); *Restatement (Second) of Trusts* § 173 (1959); *Restatement (Third) of Trusts* § 82 cmt. f (2007). Thus, the salient question is whether Congress has overridden this bedrock common law principle and required that such information be withheld from Indian trust beneficiaries. Congress has not done so.[13]

b. In pressing for a broad new rule limiting its fiduciary duties to Indians to those spelled out by statute or regulation, the government also misreads this Court's jurisprudence. *Navajo I and Navajo II*, like other decisions addressing the CFC's jurisdiction over Indian breach of trust claims, focus on the necessity of a statutory or regulatory obligation because that is the prerequisite for jurisdiction under the Tucker Act or the Indian Tucker Act. Where jurisdiction under these Acts is at issue, principles of trust law cannot substitute for a statutory or regulatory obligation, although

---

[13] The government cites the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, §§ 2-6, 96 Stat. 1976, 1976-78 (codified at 28 U.S.C. § 2415 note) as recognizing that it can assert "privileges" to limit a tribe's access to information. This Act established a method for resolving limitations issues with respect to certain pre-1966 Indian claims that the claimants desired to have considered for litigation or legislation by the United States. It provided *inter alia* that, if the Interior Secretary decided to reject a claim for litigation, the Secretary shall "provide to such claimant any nonprivileged research materials or evidence gathered by the United States in the documentation of such claim." § 5(b), 96 Stat. at 1978. The Act does not establish or recognize any particular privileges and, by its terms, is inapplicable to the post-1966 claims at issue in this action.

common law trust principles are relevant in making the second stage determination whether Congress intended damages to remedy a breach of the statutory or regulatory obligation. *See Navajo II*, 129 S. Ct. at 1551-52; *Mitchell II*, 463 U.S. at 226. But the fiduciary exception has nothing to do with jurisdiction. Rather, it relates to what evidence is available to prove a breach of trust claim where the jurisdictional requisites of the Tucker Act or Indian Tucker Act already have been satisfied. Those jurisdictional prerequisites have no place in the analysis here.

This Court has never suggested that all of the government's trust responsibilities to Indians must be spelled out in a specific statutory or regulatory mandate. In fact, the Court has observed that "[t]here is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996). Thus, "the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Id.* (emphasis in the original).

The Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. It has found and enforced trust obligations that are not specified in any statute or regulation. For example, in *Morton v. Ruiz*, 415 U.S.

199, 236 (1974), the Court invoked "the distinctive obligation of trust incumbent upon the Government in its dealings with [Indians]" in holding that Indians who lived near a reservation were entitled to general assistance benefits despite a BIA manual that limited the benefits to those who lived on a reservation. Similarly, in *Cramer v. United States*, 261 U.S. 219 (1923), the Court voided a land patent which granted Indian-occupied lands to a railway. Relying heavily on the trust relationship with Indians, and the national policy protecting Indian land occupancy, the Court found that the statutory authority of federal officials to issue land patents was limited, even though Indian occupancy of the lands was not expressly protected by treaty, executive order, or statute. *Id.* at 227-29. The Court stated that "[t]he fact that such [Indian] right of occupancy finds no recognition in any statute or other formal Governmental action is not conclusive." *Id.* at 229 (emphasis added).

The Court also uses common law trust principles to flesh out the government's fiduciary duties to Indians under statutes and regulations.[14] For example, in *United States v. White Mtn. Apache Tribe*, 537 U.S. 465, 475 (2003), the Court ruled that "elementary trust law" imposed on the government a duty to preserve and maintain trust assets where the statute establishing the trust was silent on this subject. Similarly, in *Seminole Nation*, the Court

---

[14] The Court makes similar use of the common law in other contexts. For example, it has used common law to flesh out the rights and duties of the United States on commercial paper that the government issues. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943)

held that well-established, common law principles imposed on the government a duty to prevent misappropriation of tribal funds held in trust by the government, notwithstanding the lack of a specific treaty provision, statute, or regulation imposing such a duty. 316 U.S. at 296. And, in *United States v. Mason*, 412 U.S. 391 (1973), the Court applied "familiar principles" of the common law of trusts to determine the scope of the United States' fiduciary duty in administering Indian trust property, in particular, whether it was a waste of trust monies to pay an arguably invalid state tax. *Id.* at 398-400.

c. The government, itself, has argued to this Court that it has common law trust obligations to Indians. In *Department of the Interior v. Klamath Water Users Protective Association*, the government, citing the *Restatement (Second) of Trusts*, asserted that it has a duty to an Indian beneficiary not to disclose to a third person information which it has acquired as trustee where the effect would be detrimental to the interest of the beneficiary. *See* 532 U.S. 1, 15 n.6 (2001); Brief for Petitioners at 17, 36, *Klamath*, 532 U.S. 1 (No. 99-1871).[15] And, in *United States v. Mason*, *supra*, the government cited "general trust law" and "traditional standard[s] of fiduciary responsibility" to support its argument that it had not breached its fiduciary duty to preserve an Indian trust estate by paying a doubtful state tax claim. *See* Brief for the United States at 6-9, 12-13, *Mason*, 412 U.S. 391 (No. 72-654), 1973 WL 172578.

---

[15] The Court found it unnecessary to decide whether the government has this trust duty because, in *Klamath*, any such duty was overcome by the statutory mandate of the Freedom of Information Act. *See* 532 U.S. at 15-16 & n.6.

d. Congress has never suggested that the government's fiduciary obligations to Indians are limited to specific statutory and regulatory provisions. In 1992, for example, Congress stated that "[t]he most fundamental fiduciary responsibility of the government . . . is the duty to make a full accounting of the property and funds held in trust for the . . . beneficiaries of Indian trust funds." Comm. on Gov't Operations, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499, at 6 (1992). Yet it was not until 1987 that Congress enacted a statute specifically requiring that Indian trust accounts be audited and reconciled. *See* Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329. Obviously, this does not mean that, prior to 1987, the government had no duty to account to Indian beneficiaries regarding the property and funds held in trust for them.

In 1994 Congress enacted the Indian Trust Reform Act, which "recognized and reaffirmed . . . that the government has longstanding and substantial trust obligations to Indians. " *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001). The legislative history of the Act noted that "[t]he responsibility for management of Indian Trust Funds by the BIA has been determined through a series of court decisions, treaties, and statutes." H.R. Rep. No. 103-778, at 10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3468 (emphasis added). The Act amended 25 U.S.C. § 162a by adding a new subsection that "provides a list of guidelines for the Secretary's proper discharge of trust responsibilities regarding Indian trust funds." *Id.* at 16, *reprinted in*

1994 U.S.C.C.A.N. at 3474. But Congress explicitly provided that the government's trust obligations "are not limited to" these duties. 25 U.S.C. § 162a(d). In other words, the government has additional fiduciary responsibilities, which include "the common law duties of a trustee." *Cohen's Handbook of Federal Indian Law*, § 5.03[3][b], at 410 (Nell Jessup Newton et al. eds., 2005 ed.) (citing *Cobell v. Norton*, 240 F.3d at 1101).

e. In sum, there is no authority for the government's contention that it, unlike all other trustees, is not obliged to disclose to Indian beneficiaries "such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust." *Restatement (Third) of Trusts* § 82 cmt. a.

* * * * *

The government manages Indian trust funds as a fiduciary. Thus, under well-established common law principles, when the government is sued by an Indian tribe for mismanaging those funds, it cannot shield the legal advice it received regarding trust management. Contrary to the government's arguments, the Federal Circuit properly decided this privilege issue by applying common law principles, and the court did not impose any new professional responsibilities on government counsel in doing so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEVEN D. GORDON
Counsel of Record
SHENAN R. ATCITTY
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Respondent

MARCH 2011

APPENDIX

25 U.S.C. § 161a.

Tribal funds in trust in Treasury Department; investment by Secretary of the Treasury; maturities; interest; funds held in trust for individual Indians

(a) All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

. . . .

25 U.S.C. § 162a.

Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required

(a) Deposit of tribal trust funds in banks

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks. . . . Provided further, That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States . . . .

. . . .

(d) Trust responsibilities of Secretary of the Interior

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 13 2011
OFFICE OF THE CLERK

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

25

TABLE OF CONTENTS

Page

A. Preserving the government's attorney-client privilege is consistent with Federal Rule of Evidence 501 3

B. The Federal Circuit's "real client" rationale does not support applying a fiduciary exception to the government 7

C. The government does not have a common-law trust duty to disclose attorney-client privileged communications to Indian tribes 12

TABLE OF AUTHORITIES

Cases:

A Witness Before the Special Grand Jury 2000-2, In re, 288 F.3d 289 (7th Cir. 2002) 5

Cavanaugh v. *Wainstein*, Civ. No. 05-123-GK, 2007 WL 1601723 (D.D.C. June 4, 2007) 6, 7

Charleson v. *Hardesty*, 839 P.2d 1303 (Nev. 1993) 9

Cobell v. *Norton*, 240 F.3d 1081 (D.C. Cir. 2001) 16

Cramer v. *United States*, 261 U.S. 219 (1923) 14

Department of the Interior v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) 17

Grand Jury Investigation, In re, 399 F.3d 527 (2d Cir. 2005) 5

Grand Jury Subpoena Duces Tecum, In re, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997) 5, 6

Heckman v. *United States*, 224 U.S. 413 (1912) 1, 10

Lindsey, In re, 158 F.3d 1263 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998) 4, 5, 6

Morton v. *Ruiz*, 415 U.S. 199 (1974) 13

Cases—Continued: Page

Nevada v. *United States*, 463 U.S. 110 (1983) 1, 18
Riggs Nat'l Bank v. *Zimmer*, 355 A.2d 709 (Del. Ch. 1976) 11
Seminole Nation v. *United States*, 316 U.S. 286 (1942) 14
Timbisha Shoshone Tribe v. *Salazar*, No. 10-968, 2011 WL 691366 (D.D.C. 2011), appeal docketed, No. 11-5049 (D.C. Cir. Mar. 11, 2011) 19
United States v. *Calandra*, 414 U.S. 338 (1974) 6
United States v. *Candelaria*, 271 U.S. 432 (1926) 1, 10
United States v. *Mason*, 412 U.S. 391 (1973) 17
United States v. *Minnesota*, 270 U.S. 181 (1926) 1, 10
United States v. *Mitchell*:
445 U.S. 535 (1980) 13, 17
463 U.S. 206 (1983) 13, 14, 15
United States v. *Navajo Nation*:
537 U.S. 488 (2003) 1, 12, 18
129 S. Ct. 1547 (2009) 1, 12, 13, 18
United States v. *Sells Eng'g, Inc.*, 463 U.S. 418 (1983) 6
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 14
Wallis v. *Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966) 4

Constitution, statutes, regulation and rules:

U.S. Const. Amend. V 6
American Indian Trust Fund Management Reform Act of 1994:
25 U.S.C. 162a(d) 15, 16

Statutes, regulation and rules—Continued: Page

25 U.S.C. 162a(d)(5) 15
Freedom of Information Act, 5 U.S.C. 552 *et seq* 2
Indian General Allotment Act, 25 U.S.C. 348 (1976) 13
Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, § 5(b), 96 Stat. 1978 16
Snyder Act, 25 U.S.C. 13 13
Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 19
25 U.S.C. 161a 2, 14
25 U.S.C. 161a(a) 14
25 U.S.C. 162a 2, 14
25 U.S.C. 162a(a) 14
25 U.S.C. 162a(a)-(c) 14
28 U.S.C. 530B(a) 9
28 U.S.C. 535(b) 6
28 C.F.R. 77.2(a) 9
Fed. R. Evid. 501 ..... 3, 4, 5

Miscellaneous:

Cohen's Handbook of Federal Indian Law (2005) 15
Robert S. Held, *A Trust Counsel's Duty to Beneficiaries*, 92 Ill. B.J. 636 (2004) 9
Letter from Leo M. Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice (Nov. 21, 1978) 18
Letter to Hon. William K. Suter, Clerk of the Court, from Daniel I.S.J. Rey-Bear (Mar. 16, 2011) 9

Miscellaneous—Continued: Page

1 Restatement (Third) of the Law Governing Lawyers (2000) 4, 5

Uniform R. Evid. 502 5

United States Dep't of the Interior—Office of the Solicitor (Aug. 3, 2010), http://www.doi.gov/solicitor/index.html 9

Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* (1986) 5

In the Supreme Court of the United States

No. 10-382

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The question presented in this case is whether trust-law principles applicable to private fiduciaries at common law impose a judicially enforceable duty, lacking any statutory or regulatory basis, on the United States to disclose to an Indian tribe certain attorney-client privileged information. Despite the Tribe's contentions, the answer is no.

First, three lines of this Court's precedents—(1) *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Minnesota*, 270 U.S. 181 (1926); *Heckman* v. *United States*, 224 U.S. 413 (1912); (2) *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo Nation I*); *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009) (*Navajo Nation II*); and (3) *Nevada* v. *United States*, 463 U.S. 110 (1983)—distinguish the United States from a private trustee. Those decisions establish that the United States' duties to Indian tribes do not derive from the tribes' property interests, but rather arise solely from statutes and regulations that the

United States administers as part of its sovereign functions. U.S. Br. 13-16, 31-33, 41-43. No applicable statute or regulation imposes on the United States a general duty to disclose to an Indian tribe all trust-related information, let alone to disclose attorney-client privileged communications, and there is no common-law right of access to information held by an Executive Department. Contrary to the Tribe's contention (Resp. Br. 19-20), 25 U.S.C. 161a and 162a, which specify *by statute* limited investment-related duties for tribal funds held in trust, make no mention of and thus cannot support the entirely distinct disclosure obligation sought here.

Second, reflecting the sovereign nature of the government's functions, the underpinnings critical to recognition of a fiduciary exception for private trusts are absent here. In contrast to the situation of a private trust, government attorneys and other federal officials involved in the administration of Indian affairs owe an exclusive duty of loyalty to the government (U.S. Br. 16-22); the government pays the cost of trust administration, including legal advice, out of appropriated funds, not the trust corpus (U.S. Br. 27-28); the government owns any records produced in its administration of tribal trust property (U.S. Br. 29-30, 39-40); and the release of such records, including to a tribe or individual Indian, is governed by specific statutes and regulations and the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.* (U.S. Br. 37-38, 40).

Third, abrogating the attorney-client privilege in this context would pose significant practical problems. Notwithstanding the Tribe's attempt to narrow the consequences of the court of appeals' rationale that the tribe or individual Indian is the "real client" of the government attorney (Resp. Br. 26), professional responsibility and conflict-of-interest concerns would remain. U.S. Br. 23-27. And abro-

gation of the attorney-client privilege would chill the seeking and rendering of legal advice with respect to administration of Indian property—a serious concern for the agencies charged with that responsibility. U.S. Br. 43-45.

A. Preserving The Government's Attorney-Client Privilege Is Consistent With Federal Rule Of Evidence 501

1. The Tribe contends that because common-law principles generally govern privileges under Federal Rule of Evidence 501 (Rule 501), a fiduciary exception to the attorney-client privilege—which has been recognized in certain circumstances involving private trustees, whose duties are defined by common law—should be applied to the United States as well. Resp. Br. 11-12, 13-17. That argument conflates two separate points. The first point—that determination of privileges under Rule 501 "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"—is not in dispute in this case. The second point—that the government's obligations to Indian tribes are defined by the common law of trusts, untethered to any statutory or regulatory duty—is the critical issue in dispute here. It was on that second point, which furnished the rationale for in turn abrogating the attorney-client privilege, that the court of appeals fundamentally erred.

Because the fiduciary exception that the Tribe seeks is premised on a general common-law duty of disclosure (apart from litigation discovery), the Tribe can prevail only if that duty attaches to the United States. It does not, for at least two sets of reasons: (1) unlike for a private trustee whose duties are governed by common law, only duties specified by statute or regulation are legally enforceable against the United States; and (2) none of the circumstances on which courts have relied in fashioning a fiduciary exception applicable to private trustees apply to the gov-

ernment in this context. See pp. 1-2, *supra*. Because the courts are to interpret the common law of privilege "in the light of reason and experience," Rule 501, those fundamental distinctions require rejection of a fiduciary exception to the United States' attorney-client privilege here. Just like the government has special privileges for reasons unique to the government (*e.g.*, deliberative process, law enforcement, state secrets, and Executive privilege), there are unique reasons why a fiduciary exception should not extend to the government. And as in any circumstance in which the courts are asked to fashion federal common law, the courts must take account of the governing statutory and regulatory framework—*e.g.*, *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966)—which in this context departs materially from common-law trust standards (see pp. 12-15, *infra*).

2. The Tribe's contention (Resp. Br. 13) that the "government has a weaker claim to the attorney-client privilege than a private party" is incorrect in this context. As noted in the government's opening brief (Br. 11), "[c]ourts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts," *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam), cert. denied, 525 U.S. 996 (1998), because "[t]he objectives of the attorney-client privilege * * * apply in general to governmental clients." 1 Restatement (Third) of the Law Governing Lawyers § 74 cmt. b at 573-574 (2000)). The recognition that agencies may withhold attorney-client privileged communications pursuant to FOIA Exemption 5 confirms that conclusion, and indeed courts have upheld under Exemption 5 the withholding from Indian tribes of

information concerning the management of Indian trust property. U.S. Br. 12-13.[1]

The Tribe's reliance (Resp. Br. 14-15) on cases involving governmental invocation of the privilege in grand jury proceedings is unavailing. At most, those cases stand for the proposition that distinct countervailing interests exist when a potential violation of *criminal* law is at issue, and that a government attorney may owe a greater duty of loyalty to the United States as a whole and to the public interest in criminal-law enforcement than to a more narrowly conceived government client in those circumstances. See *In re Lindsey*, 158 F.3d at 1272-1273; *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir.), cert. denied, 521 U.S. 1105 (1997); but see *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (upholding invocation of attorney-client privilege by

---

[1] The Tribe relies (Resp. Br. 13) on a 1986 treatise excerpt to question the availability of the privilege to the government. But that treatise acknowledges that courts have long recognized that federal agencies qualify as "clients" entitled to the privilege; that government officials qualify as "person[s]" within the meaning of Rule 501; and that "[w]here the governmental agency has its own staff of lawyers, courts may invoke the analogy of corporate house counsel in working out the application of the privilege." Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5475, at 128-129, 131-132 (1986). The treatise thus concludes that it is "likely that some form of privilege for governmental clients will be recognized by federal courts applying Rule 501." *Id.* at 128.

The Tribe's citation (Resp. Br. 14 n.5) to Uniform Rule of Evidence 502 as limiting the scope of the government's attorney-client privilege is equally unavailing. "[M]ost states rejected that limitation," and the "generally prevailing rule" is "that governmental agencies and employees enjoy the same privilege as nongovernmental counterparts." 1 Restatement (Third) of the Law Governing Lawyers § 74 cmt. b at 574.

governor's office over grand jury subpoena). Those countervailing interests are heightened in the special context of a grand jury—a body "deeply rooted in Anglo-American history" and guaranteed by the Fifth Amendment, *United States* v. *Calandra*, 414 U.S. 338, 342-343 (1974)—which holds "broad powers" to collect evidence through judicially enforceable subpoenas. *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 423-424 (1983). Moreover, Executive Branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General pursuant to 28 U.S.C. 535(b). See *In re Lindsey*, 158 F.3d at 1274-1275; *Duces Tecum*, 112 F.3d at 920.

In *In re Lindsey* (one of the grand jury cases relied on by the Tribe), the D.C. Circuit made clear that the government can generally avail itself of the attorney-client privilege in civil cases (158 F.3d at 1268)—a proposition that the D.C. Circuit has reiterated on numerous occasions. U.S. Br. 11-12. Although the Tribe relies on the D.C. Circuit's observation that "[u]nlike a private practitioner, the loyalties of a government lawyer * * * cannot and must not lie solely with his or her client agency," Resp. Br. 14 (quoting *In re Lindsey*, 158 F.3d at 1273), that observation means a government lawyer's duties extend more broadly to the United States as a whole, or the public interest, not to a specific *non*-government actor like an Indian tribe. Moreover, that observation reinforces the conclusion (U.S. Br. 8, 13-16) that because government lawyers are situated differently than private lawyers, abrogation of the attorney-client privilege on the basis of a supposed fiduciary exception would be especially inappropriate in this context.[2]

---

[2] The Tribe cites *Cavanaugh* v. *Wainstein*, Civ. No. 05-123-GK, 2007 WL 1601723 (D.D.C. June 4, 2007), as a case in which the fiduciary exception was "applied" to the Thrift Savings Investment Board, a federal

B. The Federal Circuit's "Real Client" Rationale Does Not Support Applying A Fiduciary Exception To The Government

1. As explained in our opening brief, the Federal Circuit's conclusion that the Interior Department "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes" (Pet. App. 15a), is deeply flawed. It departs from this Court's precedents establishing that the United States has independent sovereign interests in the administration of statutes pertaining to Indian property (U.S. Br. 13-16), as well as from the settled Executive Branch position that the United States is the exclusive client of government attorneys when the government acts in furtherance of its responsibilities towards Indians (U.S. Br. 16-22).

Rather than wrestle with the potentially broad and problematic implications of the Federal Circuit's "real client" rationale (U.S. Br. 23-30), none of which the Tribe disputes on their own terms, the Tribe all but walks away from that rationale as an independent justification for dispensing with the privilege here. See Resp. Br. 24-28. As an initial

---

agency that manages a defined contribution retirement plan for federal employees. Resp. Br. 16-17 & n.7. The plaintiff in that case, who alleged that several Board members had breached fiduciary responsibilities in settling a prior lawsuit, sought to depose Department of Justice attorneys involved in litigating the lawsuit. The district court concluded only that the government had arbitrarily and capriciously denied the deposition request based on the attorney work-product protection, by "fail[ing]" even "to consider the application of the fiduciary exception" in making an "across-the-board denial." 2007 WL 1601723, at *10 & n.11. The district court did not hold that an exception actually applied, and the discussion of such an exception was arguably dictum given the court's apparent conclusion that privileges had been waived by the Board members' reliance on an advice-of-counsel defense. See *id.* at *6-*7.

matter, the Tribe's interpretation of the "real client" rationale as meaning nothing more than that the Indian tribe is an ultimate beneficiary of the legal advice at issue (*i.e.*, the "'real client' *of the advice*," Resp. Br. 4, 7 (emphasis added)) cannot be squared with the Federal Circuit's characterization of the fiduciary exception as "a logical extension of the client's control of the attorney-client privilege" (Pet. App. 13a) or its statement that "Interior was not the government attorneys' exclusive client" (*id.* at 15a). Those descriptions obviously contemplate something other than an exclusive attorney-client relationship between government officials and government attorneys, and instead contemplate that a tribe or individual Indian is a "client" who can "control" assertion of the privilege.

Moreover, the Tribe's attempt to substitute a more benign view of the "real client" rationale as merely derivative of a "policy of full disclosure in the trustee-beneficiary relationship" (Resp. Br. 26) robs it of any independent force and effectively collapses it with the Federal Circuit's other deeply flawed rationale, *i.e.*, that the Interior Department is subject to a generally applicable common-law duty to disclose all internal governmental information concerning its administration of statutes affecting the property of Indian tribes or hundreds of thousands of individual Indians. There is no such general common law right of access, and orderly disclosure is instead governed by—and restricted by—statutes (including FOIA) and regulations. U.S. Br. 29-30, 35, 37-40. It follows *a fortiori* that there is no duty to furnish any such information that is protected by the attorney-client privilege. The Tribe's position also ignores the practical professional responsibility concerns that the Federal Circuit's ruling poses for federal government attorneys (U.S. Br. 23-27)—particularly given that those attorneys may be subject to the rules of individual States whose

courts have concluded that counsel for a private trustee can owe attorney-client duties to the trust's beneficiaries.[3] See Robert S. Held, *A Trust Counsel's Duty to Beneficiaries*, 92 Ill. B.J. 636, 649 (2004) (noting that "many jurisdictions * * * recognize a duty between a lawyer for a trust and third parties," and that while there is still uncertainty in the law, "it seems at this point that an attorney's obligations flow to the beneficiaries rather than the individual self-interest of the trust fiduciaries"); see also, *e.g.*, *Charleson* v. *Hardesty*, 839 P.2d 1303, 1306-1307 (Nev. 1993) ("[W]hen an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law.").[4]

---

[3] The Interior Department's Office of the Solicitor alone employs "three hundred * * * attorneys licensed in forty states." United States Dep't of the Interior—Office of the Solicitor (Aug. 3, 2010), http://www.doi.gov/solicitor/index.html. In addition, "attorney[s] for the Government," a term which includes many Justice Department attorneys, are subject to the laws and rules of "each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. 530B(a); see 28 C.F.R. 77.2(a).

[4] The practical problems of fashioning an exception to the attorney-client privilege in this context are further illustrated by the request from amici Navajo Nation and Pueblo of Laguna to reproduce in a publicly available appendix to their brief two documents (among others) at issue in this litigation but allegedly obtained from other tribal sources. See Letter to Hon. William K. Suter, Clerk of the Court, from Daniel I.S.J. Rey-Bear (Mar. 16, 2011). Amici's request validates the government's concern (U.S. Br. 26-27) that tribes possessing a privileged document might unilaterally attempt to waive the privilege—which otherwise would continue to exist as against third parties even if a fiduciary exception applied—by disclosing the document publicly.

Amici are correct that 11 of the documents at issue were part of the public record in a prior Court of Claims case, see Navajo Nation Amicus Br. 22-23; *id.* at 1a-3a, and the United States intends to withdraw its privilege assertion over those documents. But amici are not correct

2. The Tribe's attempted distinction (Resp. Br. 20-21) of the trio of precedents establishing that the government acts as a sovereign in Indian affairs—*Candelaria*, *Minnesota*, and *Heckman*—as not involving property formally held in trust is without merit. Both the Federal Circuit and the Tribe rely heavily on the existence of a "general trust relationship" between the government and Indians, and those three cases establish that the protection of Indian interests—whether characterized as that of a "guardian" or "trustee"—is always "distinctly an interest of the United States * * * *not to be expressed in terms of property, or to be limited * * * to the holding of a technical title in trust.*" *Heckman*, 224 U.S. at 437 (emphasis added); see *Candelaria*, 271 U.S. at 443-444; *Minnesota*, 270 U.S. at 194. Because the government acts in a distinct sovereign capacity in this context and its responsibilities are defined entirely by treaty, statute, or regulation, its obligations necessarily differ from those of a private trustee, whose duties are defined by the common law and whose "real client" may be viewed as the beneficiary.

Equally without merit is the Tribe's assertion (Resp. Br. 26) that, like private trustees, government officials seeking legal advice regarding their Indian trust duties lack a "personal stake" in the advice. That analogy fails because no government official or agency has a "personal stake" in

---

insofar as they suggest that the government waived its privilege as to seven other documents allegedly produced under an unspecified confidentiality and protective order. *Id.* at 2a-3a. Such orders typically provide that production of privileged material during alternative dispute resolution proceedings does not waive the privilege, and thereby serve as a safety net against inadvertent disclosure. But even assuming none of the documents in amici's possession remains privileged, the applicability of the privilege to approximately 30 other substantially unique documents at issue still turns on resolution of the question presented.

legal advice regarding performance of *any* sovereign function; thus, under the Tribe's rationale, the government presumably would *never* be entitled to the attorney-client privilege. More significantly, unlike a private trustee, the duty of a government official or agency that manages Indian trust property does not derive from the property itself, but rather arises from the governing statutes and regulations. Accordingly, the government official's interest is not derivative of the "beneficiary" interest of a tribe or individual Indian. U.S. Br. 13-16.

3. The fact that the legal advice, like other costs of administering statutes affecting Indian property, is paid for by annual appropriations by Congress and not from the trust corpus reinforces the conclusion that execution of such statutes is a distinctly sovereign function and that Indian tribes are not the "real clients" of government attorneys. U.S. Br. 27-30. The Tribe ignores that in what the Federal Circuit called the "leading American case" on the fiduciary exception (Pet. App. 11a), the court found that payment for the advice from the trust corpus was a "strong indication of precisely who the real clients were." *Riggs Nat'l Bank* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976). And the Tribe in fact concedes that the source of payment may have been a relevant factor in "some cases involving private trustees." Resp. Br. 27-28. Relatedly, the fact that the government owns all of the relevant records, and that disclosure of all such records is restricted by statute and regulation, contrasts starkly to the common-law rule that such records belong to the trust estate and are freely available to the beneficiary. It thereby refutes the notion that Indian beneficiaries have a general right of access to all records pertaining to the government's administration of statutes affecting Indian property. U.S. Br. 39-40. Because the supposed existence of a general and ongoing common-

law right of access to all such records was an essential premise of the court of appeals' conclusion that the Tribe should have access to the information protected by the attorney-client privilege (Pet. App. 21a-22a), elimination of that premise requires reversal of the judgment below.

C. The Government Does Not Have A Common-Law Trust Duty To Disclose Attorney-Client Privileged Communications To Indian Tribes

1. a. The Federal Circuit departed from firmly established principles in positing that the United States has a freestanding common-law "duty to disclose information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds" that is otherwise protected by the attorney-client privilege. Pet. App. 21a. To defend that result, the Tribe attempts (Resp. Br. 29-30) to read the legal principles articulated in *Navajo Nation I* and *Navajo Nation II* as strictly limited to determining jurisdiction under the Indian Tucker Act. That attempt does not withstand scrutiny.

Although the *Navajo Nation* decisions involved the viability of claims brought under the Indian Tucker Act, the Court focused on the requirement of an independent "source of substantive rights." *Navajo Nation I*, 537 U.S. at 503 ("Although the Indian Tucker Act confers jurisdiction upon the Court of Federal Claims, it is not itself a source of substantive rights."); see *Navajo Nation II*, 129 S. Ct. at 1552. For a duty to be judicially enforceable, a tribe first "must identify a substantive source of law that establishes specific fiduciary or other duties." *Navajo Nation I*, 537 U.S. at 506. That "substantive source of law" must be a "statutory or regulatory prescription," not arising merely out of a "general trust relationship." *Ibid.* Although "principles of trust law might be relevant" to the subsequent and separate question of whether that source in

turn creates a *money-mandating* duty, *Navajo Nation II*, 129 S. Ct. at 1552, they have no place in the threshold inquiry into whether there is any duty in the first place—the relevant inquiry here. The limited role that the common law played in the *Navajo Nation* decisions (U.S. Br. 31-33) vitiates the premise of the Federal Circuit's decision—*i.e.*, that the United States is a "general trustee" against which common-law trust duties, divorced from any statute or regulation, are judicially enforceable. Pet. App. 21a, 22a.

The Tribe's reliance (Resp. Br. 30-31) on pre-*Navajo Nation* cases that it contends imposed common-law duties on the government in the Indian trust context is misplaced. As the government has explained (U.S. Br. 34), *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), involved a statute requiring the government to "hold the land" allotted for Indians "in trust for the sole use and benefit" of those Indians. *Id.* at 541 (quoting Indian General Allotment Act, 25 U.S.C. 348 (1976)). Even then, the Court interpreted that statute to create, at most, a "bare trust" requiring only limited responsibilities. *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*). Although *Mitchell II* recognized a claim for breach of certain duties concerning management of timber resources on lands held in trust, those duties were predicated on specific statutes and regulations prescribing detailed responsibilities. *Ibid.* The *Mitchell* decisions thus evince the necessity of statutes and regulations to "establish a fiduciary relationship *and define the contours of the United States' fiduciary responsibilities*" to make any such responsibilities judicially enforceable. *Ibid.* (emphasis added).[5]

---

[5] For similar reasons, this case bears no resemblance to *Morton* v. *Ruiz*, 415 U.S. 199, 205-208, 237-238 (1974) (interpreting the Snyder Act, 25 U.S.C. 13, and related appropriations acts, to extend general assistance benefits to Indians living near reservations based on tradi-

b. The Tribe's reliance on 25 U.S.C. 161a and 162a, which indicate that certain tribal funds are "held in trust" (Resp. Br. 19-20), fails for that reason. Those statutes' recognition of a trust with respect to tribal funds—specifying certain requirements with respect to investment of such funds, 25 U.S.C. 161a(a), 162a(a)-(c)—does not support imposition on the United States of duties imported from the common law but not mentioned in the statutes, let alone a duty to disclose attorney-client privileged communications to an Indian tribe. U.S. Br. 33-34.

The Tribe acknowledges (Resp. Br. 31-32) that cases such as *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003),[6] and *Seminole Nation* v. *United States*, 316 U.S. 286 (1942),[7] invoked common-law trust principles only to "flesh out" duties specified in statutes and regulations. The Tribe, however, seeks to do something quite different than merely "flesh out" the contours of an existing statutory or regulatory duty. Neither 25 U.S.C. 161a(a) nor 162a(a) makes any mention of any duty to disclose to a tribe

---

tional canons of statutory construction, rather than imposing freestanding trust duty), and *Cramer* v. *United States*, 261 U.S. 219, 229-230 (1923) (interpreting statutory terms of land grant based on property law rules and "settled governmental policy," not common-law trust principles).

[6] In *White Mountain*, the Court interpreted a federal statute as requiring the government to preserve tribal trust property that the government was also authorized to use for its own purposes. 537 U.S. at 475; see *id.* at 479-480 (Ginsburg, J., concurring); U.S. Br. 34-35 & n.13.

[7] The claim in *Seminole Nation* was predicated on alleged violations of express promises by the United States in treaties and statutes to pay sums certain to the tribe. 316 U.S. at 288-297; see *Mitchell II*, 463 U.S. at 237 n.10 (Powell, J., dissenting) ("The discussion of the Government's fiduciary duty in *Seminole Nation* referred to a claim to compel payments expressly prescribed by Treaty.").

internal governmental information about the administration of those statutes, and the limited nature of the duty under the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), 25 U.S.C. 162a(d)(5), to furnish periodic account statements refutes the existence of an open-ended and far more intrusive right of access to government records.[8]

2. The Tribe also lifts out of context certain statements from a treatise and two briefs previously filed by the government in this Court. See Resp. Br. 32, 34. Neither source supports the Tribe's attempt to impose on the United States a sweeping, judicially enforceable common-law duty to disclose to Indian tribes trust-related information, including attorney-client privileged information.

a. The treatise refers to duties owed to Indian tribes by the government as those "guaranteed by treaty and federal statute," not a body of general common law. *Cohen's Handbook of Federal Indian Law* § 14.02[2][d][i] at 912 (2005). The passage of the treatise quoted by the Tribe—referring to additional "common law duties of a trustee," *id.* § 5.03[3][b] at 410—is confined to a discussion of the duties prescribed by the 1994 Act in 25 U.S.C. 162a(d). For that

---

[8] Tellingly, amici National Congress of American Indians et al. (Br. 7-14) retreat from the Federal Circuit's rationale that a "general trust relationship" between the United States and Indian tribes is "sufficiently similar to a private trust" to justify application of a fiduciary exception (Pet. App. 14a, 16a, 17a), and instead rely on the investment duties imposed by the aforementioned statutes. As explained in the text above, however, determining the scope of substantive investment-related duties by reference to common-law trust principles is very different than requiring disclosure of attorney-client privileged communications. Amici Navajo Nation and Pueblo of Laguna's reliance (Br. 24-25) on memoranda from the Solicitor's office citing trust principles to interpret the scope of statutory investment duties—*e.g.*, whether pooling of assets is permitted—fails for the same reason.

limited point, the treatise cites only *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001), the same pre-*Navajo Nation* lower-court decision on which the Federal Circuit relied in its misreading of the 1994 Act.

As explained in the government's opening brief (U.S. Br. 38), the 1994 Act's caveat that its requirements were "not limited to" those specified in the Act, 25 U.S.C. 162a(d), is properly read as a reference to other requirements imposed by statute or regulation rather than requirements drawn from the common law. At the very least, there is no basis for concluding that Congress implicitly imposed through the 1994 Act a wholesale obligation to disclose all internal governmental information, and especially attorney-client privileged information, concerning the administration of statutes concerning Indian property when it prescribed a very discrete and tailored disclosure requirement in that Act itself (*i.e.*, to furnish account statements). Indeed, Congress elsewhere has expressly preserved the government's invocation of privileges against Indian tribes and individual Indians. U.S. Br. 38-39; see Indian Claims Limitation Act of 1982 (1982 Act), Pub. L. No. 97-394, § 5(b), 96 Stat. 1978 (requiring that Interior Department disclose to Indian claimants only "nonprivileged" information documenting certain pre-1966 claims).[9] That is especially true given Congress's plenary power to legislate in the field of Indian affairs, including with respect to management of Indian property, and its vesting of au-

[9] The Tribe attempts (Resp. Br. 29 n.13) to distinguish the 1982 Act by noting that it applies only to claims arising prior to 1966 and not to the Tribe's claims in this case. While correct, that fact is beside the point. The Act demonstrates Congress's understanding that, contrary to the Federal Circuit's ruling and the Tribe's contentions, the government does possess privileges on which it may rely to withhold information concerning the management of Indian trust property. The attorney-client privilege is perhaps the most obvious such privilege.

thority in the Interior Department to issue regulations governing the disclosure to tribes and individual Indians of trust-related information in particular. U.S. Br. 39-41.

b. Contrary to the Tribe's contention (Resp. Br. 32), the government has never argued that common-law trust duties, independent of statutory or regulatory requirements, are judicially enforceable by tribes. In *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the government, arguing that correspondence between a tribe and the government was exempt from disclosure under FOIA, cited one aspect of "traditional trust doctrine"—a trustee's duty of confidentiality when disclosure is harmful to a beneficiary's interests (Gov't Br. 6, 17, 34, 36, *Klamath*, *supra* (No. 99-1871))—in support of its argument that "compelled release * * * would impair the [government's] performance of the functions assigned to it." *Id.* at 36. Those functions were ones assigned *by statute and agency directive* (see *id.* at 5-7)—including a requirement that the government deem information received from tribes "confidential * * * if disclosure would negatively impact upon a trust resource," *id.* at 7. By contrast, no such statutory or agency directive exists to support the disclosures sought in this case. U.S. Br. 36-41.

In *United States* v. *Mason*, 412 U.S. 391 (1973), the government argued that it did *not* have a fiduciary duty to refuse to pay state taxes out of funds held by the United States for an Indian estate, when the validity of the tax had been sustained by this Court's precedent but the continued vitality of that precedent had been questioned. U.S. Br. 12-13, *Mason*, *supra* (No. 72-654). The government therefore can hardly be characterized as arguing in favor of

broad "common law trust obligations to Indians" (Resp. Br. 32) in that case.[10]

3. The Tribe misapplies *Nevada* v. *United States*, *supra*. See Resp. Br. 22-24. *Nevada* states that the government cannot be held to "the fastidious standards of a private fiduciary" with respect to Indian affairs because its role as a sovereign may require it to balance potentially competing interests or duties. 463 U.S. at 128; see U.S. Br. 41-42. The Tribe's contention that the government "has no other duties that compete with its obligation to manage Indian trust funds solely for the benefit of the Indians" (Resp. Br. 8) is both legally irrelevant and factually incorrect. As a legal matter, requiring the government to demonstrate that it has or had competing duties in a particular instance before it may invoke the attorney-client privilege would severely undermine the predictability and utility of the privilege. U.S. Br. 43-44. As a factual matter, the Tribe fails to address the fact that Interior often faces conflicts

---

[10] Amici Navajo Nation and Pueblo of Laguna rely (Br. 20-21) on a Letter from Leo M. Krulitz, Solicitor, U.S. Dep't of Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice (Nov. 21, 1978). In light of subsequent precedents of this Court (including the *Navajo Nation* decisions, *supra*) and Attorney General Bell's 1979 letter (Pet. App. 121a-125a), among other developments, that 1978 letter does not represent the Interior Department's current view of the scope of legally enforceable trust obligations. In any event, although the Krulitz letter suggested that the government had a trust obligation apart from statutes and treaties, it stated that the content of that obligation "is limited to dealing fairly, not arbitrarily, with the Indians both with respect to procedural and substantive issues." Resp. App. 14a, *Mitchell I*, *supra* (No. 78-1756) (reproducing letter). Such a limited fair-dealing obligation, which "form[s] a backdrop for the construction and interpretation of the statutes, treaties, and agreements respecting the Indians," does not support imposition of the type of untethered and far-reaching disclosure duty the court of appeals recognized here. *Ibid.*; see pp. 12-15, *supra*.

among Indians themselves, whether as groups, tribes, or individuals. U.S. Br. 25-26; see also U.S. Br. 43 (discussing Doc. No. 37).[11]

In any event, the Tribe's argument extends well beyond the scope of *Nevada* and the limits of the Federal Circuit's decision. In its view, notwithstanding *Nevada*, "the existence of a competing duty would not undercut the fiduciary exception." Resp. Br. 8, 23. That assertion reveals the breadth of the Tribe's position and its disregard for this Court's precedents recognizing the unique position of the United States as a sovereign with respect to Indian affairs.

Finally, the Tribe's suggestion (Resp. Br. 8 n.1, 23 n.10) that the government has waived any contention that the documents at issue implicate potentially competing interests in managing tribal trust funds is incorrect. By providing an example of competing interests (Pet. 29; U.S. Br. 43),[12] the government does not seek to argue that any par-

---

[11] For example, a group of Western Shoshone Indians purporting to represent the Timbisha Shoshone Tribe recently brought suit to enjoin the Secretary from distributing more than $26 million pursuant to the Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805, to individual Western Shoshones, as compensation from a 30-year-old Indian Claims Commission judgment for the taking of aboriginal title. See *Timbisha Shoshone Tribe* v. *Salazar*, No. 10-968, 2011 WL 691366 (D.D.C. 2011), appeal docketed, No. 11-5049 (D.C. Cir. Mar. 11, 2011). Had the plaintiffs in that case prevailed, they might have delayed or prevented several thousand individual Indians from receiving payments from the judgment fund at issue there. The Tribe's oversimplification of the Secretary's responsibility to manage trust funds for the benefit of "the Indians" fails to account for such intra- or inter-tribal conflicts.

[12] The Tribe's response on the merits of that example—that "permitting a lawful levy upon a trust account does not conflict with the fiduciary duty to manage and invest the trust account for the benefit of the beneficiary," Resp. Br. 23 n.10—overlooks the Secretary's responsibility to examine the validity of the levy closely enough to ensure the

ticular document be withheld on that basis. Rather, the government relies on that example to dispel the Tribe's and Federal Circuit's erroneous assumption that the possibility of competing interests arises only with respect to management of land or natural resources (as opposed to trust funds). Under the Court's decision in *Nevada*, the possibility of competing interests reinforces the inappropriateness of subjecting the government (without any statutory or regulatory mandate) to a duty of disclosure applicable to a private fiduciary at common law. U.S. Br. 42-43. Indeed, the government relied on *Nevada* before the Federal Circuit in support of that broader argument. Gov't C.A. Pet. 11-14, 23-25. Accordingly, that legal argument is not waived and stands fully briefed for consideration by this Court.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

APRIL 2011

Secretary's independent role in managing Individual Indian Money accounts but deferentially enough to provide comity to the tribe as a separate sovereign.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 30 2011
OFFICE OF THE CLERK

No. 10-382

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JICARILLA APACHE NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AND FEDERAL BAR ASSOCIATION – INDIAN LAW SECTION AS *AMICI CURIAE* SUPPORTING RESPONDENT

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, N.W.
Washington, DC 20005
(202) 466-7767

Counsel for NCAI

CARTER G. PHILLIPS*
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amici Curiae
* Counsel of Record

March 30, 2011

Additional Counsel on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

LLOYD B. MILLER
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS,
SACHSE, MILLER &
MUNSON, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for FBA-ILS

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. THE UNITED STATES HAS A TRADITIONAL FIDUCIARY RELATIONSHIP WITH THE JICARILLA WITH RESPECT TO TRUST FUND ADMINISTRATION	7
II. THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE FIDUCIARY RELATIONSHIP IN THIS CASE	15
A. The Premises And Purposes Of The Fiduciary Exception Are Served By Its Application Here	15
B. The United States' Contrary Arguments Distort The Fiduciary Exception	19
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page

Barnett Bonds Trust Co. v. *Compson*, 629 So. 2d 849 (Fla. Dist. Ct. App. 1993) 22
Cobell v. *Salazar*, 573 F.3d 808 (D.C. Cir. 2009), *petition dismissed*, No. 09-758 (U.S. June 24, 2010) 18
Cox v. *Administrator*, 17 F.3d 1386 (11th Cir.), *revised*, 30 F.3d 1347 (11th Cir. 1994) 16
Garner v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) 16
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 9
Lockheed Corp. v. *Spink*, 517 U.S. 882 (1996) 8, 16
In re Long Island Lighting Co., 129 F.3d 268 (2d Cir. 1997) 16
Mattingly v. *United States*, 939 F.2d 816 (9th Cir. 1991) 19
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 8
Nevada v. *United States*, 463 U.S. 110 (1983) 2, 8, 18
Riggs Nat'l Bank of Wash. D.C. v. *Zimmer*, 355 A.2d 709 (Del. Ch. 1976) 7, 15, 16, 17
United States v. *Kagama*, 118 U.S. 375 (1886) 8
United States v. *Mason*, 412 U.S. 391 (1973) 7
United States v. *Mett*, 178 F.3d 1058 (9th Cir. 1999) 16
United States v. *Mitchell*, 445 U.S. 535 (1980) 2, 13
United States v. *Mitchell*, 463 U.S. 206 (1983) ..... *passim*

TABLE OF AUTHORITIES – continued

Page

United States v. *Navajo Nation*, 537 U.S. 488 (2003) 2
United States v. *Navajo Nation*, 129 S. Ct. 1547 (2009) 3, 6, 20
United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) 3, 13, 14, 20
United States v. *Yellow Cab Co.*, 338 U.S. 338 (1949) 19
Wachtel v. *Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) 4, 5, 15, 16, 17

STATUTES

American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ..... 10, 11
25 U.S.C. § 161 ..... 3, 10
§ 161a 3, 10
§ 161b 3
§ 162a 3, 10, 11
§§ 4001 *et seq.* 3
§ 4011 11
§ 4041 ..... 3, 12
§ 4042 11
§ 4043(b) 3, 12
§ 4044 12

RULES

Fed. R. Civ. P. 26(b)(2) 18
Fed. R. Evid. 501 4
Fed. R. Evid. 1101 ..... 6, 19

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY Page

Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 (1992) 9, 10, 11, 13
H.R. Rep. No. 103-778 (1994) 11

FOREIGN CASE

Talbot v. *Marshfield*, (1865) 62 Eng. Rep. 728 (Ch.) 16

OTHER AUTHORITIES

Restatement (Second) of Trusts (1959) 21
Dep't of the Interior, *Departmental Manual, available at* http://elips.doi.gov/app_dm/dm.cfm 12

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and its member tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes. NCAI's interest in this case arises from its long-term commitment to ensuring the fair application of federal law to tribes.

Established in 1920, the Federal Bar Association is a voluntary bar association with approximately 15,660 members who work together to promote the sound administration of justice. The FBA Indian Law Section ("FBA-ILS") is the oldest and largest section of its kind, and is devoted to advancing the field of federal Indian law, assisting in its consistent development, and promoting the interests of those practicing federal Indian law.

The issue here is whether, and under what circumstances, tribes may invoke the fiduciary exception to the attorney-client privilege in light of the United States' statutory trust responsibilities with respect to tribal trust funds. *Amici* submit that the United States and the tribes have a fiduciary relationship with respect to tribal trust funds that warrants application of the fiduciary exception in closely circumscribed contexts, including in this case.

---

[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to its filing, and the letters of consent have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States' trust relationship with American Indian tribes and people varies substantially depending on the context in which it arises. It includes a spectrum of obligations and responsibilities, from the "limited trust" to prevent improvident alienation of land in the General Allotment Act, see *United States* v. *Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*"), to the joint representation of Indian and other federal interests in water under federal law, see *Nevada* v. *United States*, 463 U.S. 110 (1983), to the "fiduciary" obligation to manage timber resources in the tribes' best interests, see *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). The general trust relationship between the United States and Indian tribes "'reinforce[es]'" the United States' fiduciary obligations, see *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"), but the United States' "specific fiduciary or other duties" to a tribe determine the precise consequences which flow from the United States' legal responsibilities. *Id.* When, as here, federal statutes define a traditional fiduciary trust relationship between the United States and a tribe, the fiduciary exception to the attorney-client privilege applies under Federal Rule of Evidence 501.

In assessing whether the fiduciary exception applies, this Court must first assess the scope and nature of the United States' responsibilities to the Jicarilla Apache Nation ("Jicarilla") in the setting presented here – the United States' obligations in connection with tribal trust funds. Once that relationship is properly understood, it is clear that the fiduciary exception applies to the legal advice the

United States receives in administering tribal trust funds.

1. This current phase of the litigation between the United States and the Jicarilla involves the United States' accounting, management and investment of the Jicarilla's trust funds from 1972 to 1992. App. 25a-26a, 115a-119a. Those claims arise under 25 U.S.C. §§ 161, 161a, 161b, 162a, and the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001 *et seq.* ("1994 Trust Fund Act"), which recognizes and codifies the existing trust relationship. These statutes expressly refer to the United States as "trustee of the various Indian tribes," *id.* § 161, and to the accounts at issue as "tribal trust funds," see, *e.g.*, *id.* § 162a. They also recognize the United States' control and discretion with respect to the management and investment of the funds. The statutes acknowledge "[t]rust responsibilities of the Secretary of the Interior," stating that they "shall include (but are not limited to)" providing "adequate systems for accounting for and reporting trust fund balances." *Id.* § 162a(d). Indeed, the 1994 Trust Fund Act establishes a Special Trustee for American Indians "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes," *id.* § 4041(1), with a particular focus on tribal trust accounts, see, *e.g.*, *id.* § 4043(b)(2)(A).

These statutory "prescription[s] . . . bear[] the hallmarks of a 'conventional fiduciary relationship.'" *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1558 (2009) ("*Navajo II*"). The United States manages and has control over trust funds, discretion with respect to their investment, and detailed responsibilities to account to the tribal beneficiaries. See also *United*

States v. *White Mountain Apache Tribe*, 537 U.S. 465, 480 (2003) (the statute "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations, and 'invests the United States with discretionary authority to make direct use of portions of the trust corpus'") (citation and alteration omitted) (Ginsburg, J., concurring). As this Court explained, "[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)." *Mitchell II*, 463 U.S. at 225 (internal quotations omitted). From that determination, certain consequences flow, including application of the fiduciary exception to the attorney-client privilege in appropriate circumstances.

2. Federal Rule of Evidence 501 provides that questions of privilege "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. In this case, the Court of Federal Claims and the Federal Circuit correctly determined that the United States could not invoke the attorney-client privilege to withhold documents concerning the administration of funds held in trust for the Jicarilla.

At common law, a trust's beneficiaries have the right to documents containing legal advice involving trust administration that is not provided in anticipation of adversarial legal proceedings against him or her. See *Wachtel* v. *Health Net, Inc.*, 482 F.3d 225, 229-32 (3d Cir. 2007) (citing cases). This fiduciary exception to the attorney-client privilege has two bases: first, the fact that the trustee is procuring legal advice for the benefit of the trust (and

hence the beneficiary) and, second, the trustee's duty to disclose information regarding trust administration to the beneficiary. *Id.* at 235-36. Critically, it does not apply when there is litigation anticipated between the trustee and trust beneficiaries. *Id.*

These same considerations form the basis of the fiduciary exception to the attorney-client privilege. That exception has been applied in numerous relationships that, like the federal-tribal relationship, are fiduciary in some but not all contexts – trustee-beneficiary, corporation-shareholder, bank-depositor, union-member, ERISA fiduciary-beneficiary. In each of these relationships, there are contexts where application of the exception is warranted, and contexts in which the exception does not apply. The United States' relationship with the tribes is no different, and the application of the exception varies from context to context. The United States argues that when it has conflicting or competing interests, the fiduciary exception does not apply. But that question is not remotely presented by this case. Here the United States has no competing or conflicting concerns.

Indeed, the United States has a paradigmatic fiduciary relationship with the Jicarilla in its control over and management of the Jicarilla's tribal trust funds. Prior to anticipation of this litigation, the United States' interests in trust administration were identical to the interests of the tribal trust fund beneficiaries, and the United States does not allege that it took any conflicting or competing concerns into account as it administered the Jicarilla's trust funds. App. 18a-19a.

There is no meaningful difference between the traditional trust beneficiary's relationship with a trust lawyer addressing a question related to trust

administration at the behest of a trustee and a tribe's relationship with a United States lawyer addressing a question related to tribal trust fund administration at the behest of the Secretary of the Interior. In both situations, the fiduciary exception clearly applies.

3. The United States' contrary arguments lack merit. First, it claims that it cannot have a duty to disclose privileged documents unless a statute specifies that it must. The Federal Rules of Evidence, like the Federal Rules of Civil and Criminal Procedure, apply to the United States when it litigates in federal courts. See, *e.g.*, Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."). No additional federal statute specifically imposing those litigation rules on the Government is required. Moreover, this Court's precedent makes clear that once a trust obligation is established, the common law of trusts "play[s] a role" in fleshing out the United States' duties. *Navajo II*, 129 S. Ct. at 1558. Application of the common law here requires disclosure under the fiduciary exception.

The United States further contends that its lawyers cannot also be the tribe's lawyers because a series of consequences, such as disabling application of the conflict of interest rules, would follow. US Br. 13-30. These are straw man arguments. The *legal advice* provided by Government lawyers in connection with the United States' fulfillment of its fiduciary obligations to administer tribal trust funds is for the benefit of the tribes. The Jicarilla Apache Nation thus is not a client, see *id.* at 23-27, but is instead a beneficiary of that advice. That status entitles it to access to attorney advice given in connection with trust administration under the fiduciary exception.

Finally, the United States claims that the fact that it – rather than trust funds – pays its attorneys' salaries means that it is not subject to the fiduciary exception. *Id.* at 27-28. But, the source of payment of a trustee is not dispositive of whether the fiduciary exception applies. Instead, it is simply one piece of evidence that the exception may apply because the source of payment can indicate whether the lawyer is serving the trust or some personal interest of a trustee. See *Riggs Nat'l Bank of Wash. D.C.* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976). Here, the United States' fiduciary relationship with the tribes was created by history and statute. Neither suggests that the United States' payment of the salaries of attorneys giving advice about tribal trust fund administration indicates that the United States is protecting its own interests rather than the tribe's. The lower courts correctly refused to draw an inference of conflict from the source of the lawyers' compensation.

The fiduciary exception to the attorney-client privilege applies in limited circumstances, but this case fits comfortably within that exception.

ARGUMENT

I. THE UNITED STATES HAS A TRADITIONAL FIDUCIARY RELATIONSHIP WITH THE JICARILLA WITH RESPECT TO TRUST FUND ADMINISTRATION.

This Court routinely refers to the "general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225-26 (citing numerous cases). That relationship has general consequences: It has been invoked to emphasize the high standard of care the United States must exercise in its dealing with Indians, see, *e.g.*, *United States* v.

Mason, 412 U.S. 391, 398 (1973), to interpret ambiguous treaty language in the tribes' favor, see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and to preclude unauthorized state jurisdiction over Indian lands and property, *United States* v. *Kagama*, 118 U.S. 375 (1886). The United States appears to frame the dispute in this case as whether its "general trust relationship" with the tribes, standing alone, requires application of the fiduciary exception. But that is not the issue here.

Trust relationships are complex: The same entity or person is often a fiduciary for some purposes and not for others. See, *e.g.*, *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 891 (1996) (employer is an ERISA fiduciary when making benefits determinations but not when making decisions about plan adoption, modification or termination). The United States' trust relationship with tribal nations and their citizens shares this characteristic because Congress has occasionally required federal agencies such as the Department of the Interior to pursue conflicting or competing interests. See *Nevada*, 463 U.S. at 128 ("it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands").

This case presents no such complexities, however, and this Court need not and should not consider what consequences flow solely from the United States' general trust relationship with the Jicarilla or from conflicting United States' responsibilities to different entities. Here, *federal statutes* clearly create a fiduciary relationship *with respect to tribal trust funds*. See *infra* 11-12. The United States' general trust

obligation thus "reinforce[s]" the conclusion that those laws impose fiduciary obligations on the United States. *Mitchell II*, 463 U.S. at 225. **Moreover, the United States has no conflicting or competing interests in administering those trust funds.** See *Lincoln* v. *Vigil*, 508 U.S. 182, 194 (1993) ("the law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity'") (quoting *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987)).

Specifically, in the current phase of this litigation, the Jicarilla Apache Nation alleges that the United States breached its duty to invest the Jicarilla's trust funds to obtain the maximum return, made unauthorized disbursements of trust funds, delayed in depositing funds in tribal trust accounts, and other similar claims. These claims were alleged to arise under a group of federal statutes that make the United States a traditional fiduciary with respect to tribal trust accounts. "[T]he language of these statutory . . . provisions directly supports the existence of a fiduciary relationship." *Mitchell II*, 463 U.S. at 224.

"The system of trusteeship and Federal management of Indian funds is deeply rooted in Indian-U.S. history." See *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499, at 6 (1992) ("*Misplaced Trust*"). The United States first adopted the policy of holding tribal funds in trust in 1820. *Id.* Federal law requires that tribal and individual Indian trust funds "be deposited in the U.S. Treasury or managed in trust by the United States." *Id.* (citing, *inter alia*, 25 U.S.C. § 162a). And, since 1918, the Interior Department has had "the legal authority to invest Indian funds held in

trust." *Id.* "To ensure the safety of these funds, such investments must be unconditionally secured either through Government deposit insurance or through pledging collateral guaranteed by the U.S. Government." *Id.* Congress has also "carefully regulated the disbursement of Indian trust funds." *Id.* at 7.

The principal statutory provisions recognizing the United States' trust responsibilities with regard to Indian trust funds are codified at 25 U.S.C. §§ 161, 161a and 162a. These sections are entitled in relevant part "Deposit in Treasury of trust funds," 25 U.S.C. § 161, "Tribal funds in trust in Treasury Department; investment by Secretary of the Treasury," *id.* § 161a, and "Deposit of tribal funds in banks; . . . investments," *id.* § 162a. Section 161 requires the United States to deposit in the Treasury and pay interest on such funds when "the best interests of the Indians will be promoted by such deposits, in lieu of investments." As this Court observed in *Mitchell II*, these statutes give the Secretary of the Interior "authority to invest tribal . . . funds held in trust in banks, bonds, notes or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians." 463 U.S. at 223 n.24 (citing 25 U.S.C. § 162a). The statutory text – and the obligations it imposes on the United States – recognize and govern the traditional fiduciary relationship between the United States and tribes in connection with the trust funds at issue here.

Congress further addressed the United States' administration of tribal and individual Indian trust funds in the 1994 Trust Fund Act. See Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 161a(b), 162a, 4001 *et seq.*). In that Act, Congress explicitly acknowledged both the existence and the

fiduciary nature of the United States' responsibilities and sought to address serious deficiencies in the government's management of Indian trust funds. See, *e.g.*, *Misplaced Trust*, at 1-8; H.R. Rep. No. 103-778, at 8 (1994).

Indeed, the 1994 Trust Fund Act described its provisions as a "*recognition*" of existing trust responsibility with respect to tribal and individual Indian trust funds. See 1994 Trust Fund Act, Pub. L. No. 103-412, tit. I, 108 Stat. at 4240 (capitalization omitted; emphasis supplied). It provided that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust" for a tribe or an individual Indian "which are deposited or invested pursuant to [25 U.S.C. § 162a]." 25 U.S.C. § 4011(a). It further required the Secretary to conduct an "annual audit" of all funds held in trust for the benefit of a tribe or individual Indian "which are deposited or invested pursuant to section 162a." *Id.* § 4011(c).

The 1994 Trust Fund Act also amended 25 U.S.C. § 162a, adding a subsection (d) which specified that the Secretary of the Interior's "proper discharge of the trust responsibilities of the United States shall include (but are not limited to)" a series of accounting, auditing, management and disclosure obligations with respect to tribal and individual Indian trust funds. See *id.* § 162a(d).

Finally, the 1994 Trust Fund Act established an Office of Special Trustee for American Indians within the Interior Department to address problems with Indian trust funds. *Id.* § 4042(a). Congress took this action "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians . . . to oversee and coordinate

reforms within the Department of practices relating to the management and discharge of such responsibilities," and "to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians." *Id.* § 4041(1), (3).

Congress requires the Special Trustee to "monitor the reconciliation" of both "tribal and Individual Indian Money trust accounts" to ensure that account holders receive a "fair and accurate accounting of all trust accounts." *Id.* § 4043(b)(2)(A). And, Congress specifies that the Trustee must ensure that policies, procedures and systems are created to allow proper accounting for and investing of all trust fund monies. *Id.* § 4043(b)(2)(B). See also *id.* § 4044 (requiring, with respect to the Secretary's reconciliation of "tribal trust fund" accounts, a report to Congress identifying "a balance reconciled as of September 30, 1995" for each tribal account by mid-1996, including a description of the Secretary's methodology).[2]

These detailed provisions confirm what has been true at least since the original enactment of the law now codified in §§ 161, 161a and 162a – that the United States has a traditional fiduciary relationship

---

[2] If more were needed, the Departmental Manual of the Department of the Interior, Part 303 Indian Trust Responsibilities, states "Principles for Managing Indian Trust Assets," and explains that "[i]t is the policy of the Department of Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty," including its trust responsibility to "[a]ccount for and timely identify, collect, deposit, invest, and distribute income due or held on behalf of beneficial owners." Dep't of Interior, *Department Manual*, pt. 303, ch. 2, § 2.7(H) (Oct. 31, 2000), *available at* http://elips.doi.gov/app_dm/dm.cfm (table of contents). *See id.* ch. 6 (Sept. 5, 2003) (describing responsibilities with respect to "Indian Fiduciary Trust Records").

with tribes and Indians for tribal and individual Indian trust funds. The United States administers the trust, including accounting for the funds and making discretionary investment decisions. Where, by statute or regulation, the United States is vested with "control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)." *Mitchell II*, 463 U.S. at 225 (internal quotations omitted). This is true "even though nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection." *Id.* (internal quotations omitted). In this case, of course, the statutes speak explicitly and repeatedly of a trust relationship and recognize the United States' traditional fiduciary responsibilities with respect to tribal trust funds. See also *Misplaced Trust*, at 8 (the Bureau of Indian Affairs' "fiduciary responsibilities are not dissimilar to the duties performed by many private trustees").

The United States' fiduciary responsibilities with respect to tribal trust funds reach far beyond the "limited" or "bare" trust found insufficient to support monetary damages under the General Allotment Act, see *Mitchell I*, 445 U.S. at 542; *Mitchell II*, 463 U.S. at 224. Indeed, the duties imposed by statute here create a "conventional fiduciary relationship" under *all opinions* in *White Mountain Apache*, 537 U.S. at 473. See *id.* at 475 (in addition to expressly creating a "trust" relationship, the statute provided the United States with "control at least as plenary as its authority of the timber in *Mitchell II*").

Justice Ginsburg concurred in the *White Mountain Apache* majority's determination that the United States had fiduciary duties because "the Act

expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations," and because the "plenary control the United States exercises under the Act as sole manager and trustee, . . . places this case within *Mitchell II*'s governance." See *id.* at 480, 481 (Ginsburg, J., concurring). Justice Thomas dissented because no federal statutes or regulations gave the United States "'pervasive'" control over the property at issue, the Act created only a "'bare trust.'" *Id.* at 484, 485 (Thomas, J., dissenting). By contrast, here, the United States' control of the trust funds is "pervasive." Accordingly, under the framework of every opinion in *White Mountain Apache*, the statutes here create a fully realized traditional fiduciary relationship with the correlative duties that relationship imposes.[3]

As we show in Part II, the fiduciary relationship at issue is identical to those that support the common law fiduciary exception to the attorney-client privilege.

---

[3] In demonstrating that a traditional fiduciary relationship exists here, *amici* rely on this Court's cases addressing when the United States has taken on statutory obligations sufficient to give rise to money-mandating obligations under the Indian Tucker Act (*e.g.*, *Navajo I*, *Navajo II*, *Mitchell I*, *Mitchell II*, *White Mountain Apache*). These cases delineate when the United States has assumed fiduciary responsibilities as a first step to determining whether damages can be imposed. However, fiduciary responsibilities that are *not* money-mandating may also warrant application of the fiduciary exception to the attorney-client privilege. For example, where Indians seek and laws authorize equitable relief, such as an accounting or restitution, the United States may act as a traditional fiduciary. *See* App. 44a. The applicability of the fiduciary exception turns on the nature of the relationship.

II. THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE FIDUCIARY RELATIONSHIP IN THIS CASE.

Federal Rule of Evidence 501 tells the courts to apply common law rules to decide questions of evidentiary privilege. The common law rule at issue is the fiduciary exception to the attorney-client privilege. It applies in narrow circumstances when a beneficiary seeks to discover legal advice about trust administration. Because the United States and the Jicarilla are in a conventional fiduciary relationship with respect to the tribal trust funds and all other conditions for application of the fiduciary exception are met, that exception should apply to legal advice the United States obtained to administer the trust.

A. The Premises And Purposes Of The Fiduciary Exception Are Served By Its Application Here.

The fiduciary exception to the attorney-client privilege originated in 19th century England. "Under English common law, when a trustee obtained legal advice relating to his administration of the trust, and not in anticipation of adversarial legal proceedings against him, the beneficiaries of the trust had the right to the production of that advice." *Wachtel*, 482 F.3d at 231 (citing *Talbot* v. *Marshfield* (1865), 62 Eng. Rep. 728 (Ch.)).

United States courts began to recognize the common law fiduciary exception in the 1970s. See, *e.g.*, *Riggs*, 355 A.2d at 712 (requiring disclosure to beneficiaries of a legal memorandum on matters of trust administration that had been prepared for trustees). The exception has been acknowledged in numerous circuits. See *Wachtel*, 482 F.3d at 233

(citing cases). It has been considered not only in cases involving common law trusts, *Riggs*, 355 A.2d at 709, but also in disputes between corporations and shareholders, see *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); labor organizations and union members, *Cox* v. *Administrator*, 17 F.3d 1386, 1415 (11th Cir.) (citing cases), *revised*, 30 F.3d 1347 (11th Cir. 1994); and ERISA fiduciaries and beneficiaries, *Wachtel*, 482 F.3d at 233-34.

Significantly, the exception applies only to legal advice related to administration of the trust or the fiduciary relationship. It does not apply when the trustee is not acting in a fiduciary role. See *Lockheed Corp.*, 517 U.S. at 891 (employer is an ERISA fiduciary when engaged in discretionary acts of plan administration, but not when engaged in adoption, modification, or termination of a benefit plan); *In re Long Island Lighting Co.*, 129 F.3d 268, 272-73 (2d Cir. 1997) ("privileged consultation on non-fiduciary matters does not defeat the fiduciary exception . . . on fiduciary matters" (emphasis omitted)). And, it does not apply when the advice is obtained in anticipation of adversarial litigation against the trustee, see App. 47a; *Talbot*, 62 Eng. Rep. at 730; *Riggs*, 355 A.2d at 711; *United States* v. *Mett*, 178 F.3d 1058, 1063-64 (9th Cir. 1999). In sum, the fiduciary exception has a defined range of applications; it applies most comfortably to legal advice procured by a trust for purposes of trust administration at times when the trustee is not anticipating litigation.[4]

---

[4] The United States and respondent dispute whether the fiduciary exception applies when a fiduciary is making decisions about trust funds while he or she has lawfully conflicting or competing interests. US Br. 41-42; Resp. Br. 23-24. That question plainly is not presented here because the United States

Courts recite two basic reasons for applying the exception in these limited circumstances: First, in traditional fiduciary relationships, a trustee has a duty to disclose information about trust administration to trust beneficiaries. *Riggs*, 355 A.2d at 711. That information would include legal advice about trust administration issues. Second, trust beneficiaries are the real beneficiaries of the trust's attorneys' advice because the advice about trust administration is obtained for their benefit, not the trustee's. See *Wachtel*, 482 F.3d at 232 ("of central importance in both *Garner* and *Riggs* was the fiduciary's lack of a legitimate personal interest in the legal advice obtained"). These bases for the fiduciary exception explain why it has not been applied when the trustee is anticipating litigation against him or herself (*e.g.*, for a breach of fiduciary duty). In that circumstance, the conflict displaces the inference that the advice was obtained for the beneficiary's benefit.

Here, as shown above, the United States and the Jicarilla Apache Nation have a traditional fiduciary relationship with respect to tribal trust funds. The beneficiary seeks to discover legal advice provided to a trustee (the United States) about matters of trust administration at a time when the trustee did not anticipate litigation. Indeed, in its role as fiduciary of tribal trust funds, the United States does not have (and did not even assert that it has) any conflicting or competing concerns on matters of trust fund administration. App. 19a.

The fundamental problem with the United States' position is that it treats the question of whether the

---

never identified competing interests in the courts below. App. 19a.

fiduciary exception applies to its relationships with tribes as an all-or-nothing proposition – *i.e.*, that the fiduciary exception is *never* appropriate unless it is *always* appropriate. Cf. US Br. 35-36 (describing variations of trust relationships). There is virtually no traditional fiduciary-beneficiary relationship in which the exception *always* or *never* applies. In many, if not most, fiduciary relationships there will be times when the exception plainly applies and other times when the trustee is pursuing its own, distinct interests. Privilege determinations are made on a case-by-case basis, so courts will examine the individual contexts in which the fiduciary exception arises and determine whether its application is appropriate. If any unique governmental interest bears on the application of the fiduciary exception, courts will take it into account. Cf., *e.g.*, *Cobell* v. *Salazar*, 573 F.3d 808, 813, 815 (D.C. Cir. 2009) ("scope of the accounting must also be balanced" to allow "Interior to concentrate on picking the low-hanging fruit" (emphasis omitted)); Fed. R. Civ. P. 26(b)(2) (authorizing courts to set limits on equitable discovery).

The United States' trust relationship with Indian tribes is no different than other fiduciary relationships except that its history is deeper, and its subject matter is more variable. Where, as here, aspects of the relationship mirror a traditional fiduciary relationship (and other conditions for invocation of the exception exist), the fiduciary exception applies. See *Nevada*, 463 U.S. at 142 ("where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States").

B. The United States' Contrary Arguments Distort The Fiduciary Exception.

The United States makes three arguments that the fiduciary exception does not apply here. None withstands scrutiny.

First, the United States asserts that because there is no statute that gives the United States a duty to provide the tribes with privileged documents, the United States has no duty. US Br. 30-41. The United States is confusing the requirements for the creation of compensable fiduciary relationships with the rules of evidence that govern the conduct of litigation. Federal Rule of Evidence 501 governs the application of privilege rules and their exceptions in federal court litigation. See Fed. R. Evid. 1101(a) ("[t]hese rules apply to the United States district courts"); *id.* 1101(c) ("[t]he rule with respect to privileges applies at all stages of all actions, cases, and proceedings").

A rule of evidence does not impose a disclosure obligation independent of litigation on the United States; along with other federal rules of civil and criminal procedure, it sets the terms of federal court litigation. It binds the United States just as other procedural rules do. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("[i]t ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants"); *Mattingly* v. *United States*, 939 F.2d 816, 818 (9th Cir. 1991) (affirming Rule 11 sanctions against the government, stating "when the United States comes into court as a party in a civil suit, it is subject to the Federal Rules of Civil Procedure as any other litigant").

Moreover, the United States' argument that "only a specific statutory or regulatory mandate" can create "judicially enforceable obligations" (US Br. 31) cannot be reconciled with *Navajo II*, *White Mountain Apache* and *Mitchell II*. In those cases, which address when the United States must respond in money damages to violations of fiduciary and other duties to Indians and Indian tribes, this Court has explained that the United States has duties that are not strictly defined.

For example, once federal law imposes a "'conventional fiduciary relationship'" on the United States vis-à-vis an Indian tribe, "then trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Navajo II*, 129 S. Ct. at 1552 (emphasis omitted; alteration in original) (quoting *White Mountain Apache*, 537 U.S. at 473, 477). See also *White Mountain Apache*, 537 U.S. at 477 (concluding that "the trust relationship [may be] considered when *inferring* that the trust obligation was enforceable by damages" (emphasis supplied)). Similarly here, the United States and the tribes have fiduciary relationships with respect to tribal trust funds, and thus common law trust principles – including those relevant to assessing the application of the fiduciary exception – apply.

Second, the United States argues that its lawyers cannot be treated as the tribe's lawyers and therefore that the fiduciary exception never applies to legal advice it receives in connection with trust administration. US Br. 13-27. The "real client" formulation, however, is no aid to the United States. It is only a shorthand that is intended to convey that, with respect to "fiduciary" decisions, the trustee is obligated to serve the best interests of trust beneficiaries, and therefore that the trust's interest

in receiving legal advice related to trust administration is identical to the beneficiary's interest. That is, a fiduciary's duties are such that it is legitimate to treat *both* the fiduciary seeking advice about trust administration and the beneficiary of that trust as recipients of the legal advice given by the trust lawyer.

This does not impose on the United States' lawyers the conundrum the Solicitor General imagines. Just as entities and persons who are fiduciaries are not always acting as fiduciaries (*e.g.*, the employer who is both an ERISA fiduciary and a trust settlor), government lawyers are sometimes providing legal advice to the United States as a fiduciary and sometimes (more frequently) providing legal advice to the United States in other capacities and for other purposes. Strict application of ethics rules governing conflicts of interest does not follow a determination that a trust's lawyer is providing legal advice that benefits both the trust and its beneficiaries.

Finally, the United States contends that the fact that Interior Department lawyers are paid by the Government, not by the tribal trust funds, makes the fiduciary exception inapplicable. US Br. 27-29. The United States correctly notes that courts have treated a trust's payment for legal advice as some evidence that the trust (not the fiduciary) is the "real client" of a lawyer providing advice, and conversely that a trustee's personal payment for legal advice is some evidence that the trustee is protecting his or her own interests. *Id.* See also *Restatement (Second) of Trusts* § 173 cmt. b (1959) (the fiduciary exception may not apply when a trustee obtains advice "at his own expense and for his own protection").

Payment, however, is relevant to, but not dispositive of, the question whether a lawyer is

providing advice related to the administration of the trust for the beneficiaries. See *Barnett Bonds Trust* v. *Compson*, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. 1993) (per curiam) (declining to apply the fiduciary exception even though the trust paid for the legal advice). That is what the lower courts did here, ultimately concluding that the United States' payment of its attorneys' salaries was not determinative. Indeed, any settler of a trust could provide that the trustee's expenses would be paid from a separate account to avoid burdening the beneficiaries; doing so would raise no inference that the trustee was not acting for the trust's beneficiaries.

In any event, the situation presented here is not comparable to either scenario described above. The United States has recognized and defined by statute its fiduciary trust responsibilities with respect to tribal trust funds. As creator of these trusts, it did not require tribal or individual Indian trust funds to contribute to administrative costs such as attorneys' fees. The United States' statutory assumption of certain trust expenses pursuant to its trust relationship with tribes does not make it any less a fiduciary, and does not alter its lawyers' duties when advising the United States regarding its fiduciary responsibilities in administering tribal trust funds. In other words, the United States is not choosing to pay for legal advice "for [its] own protection" as against beneficiaries when it seeks its attorneys' guidance on trust administration matters.

The United States is a traditional fiduciary with respect to tribal trust funds. It makes little sense to say – as the Government would have it – that the United States should nonetheless be treated as adverse to its beneficiaries (or lacking mutuality of

interest with its beneficiaries) simply because it pays its lawyers' salaries.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, N.W.
Washington, DC 20005
(202) 466-7767

Counsel for NCAI

LLOYD B. MILLER
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for FBA-ILS

CARTER G. PHILLIPS*
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amici Curiae

March 30, 2011

* Counsel of Record

AMICUS CURIAE BRIEF

No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JICARILLA APACHE NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS CURIAE BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT

ALAN R. TARADASH
Counsel of Record
DANIEL I.S.J. REY-BEAR
TIMOTHY H. MCLAUGHLIN
NORDHAUS LAW FIRM, LLP
405 Dr. Martin Luther
King, Jr. Ave. NE
Albuquerque, NM 87102
artaradash@gmail.com
505-243-4275

QUESTION PRESENTED

Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between government officials and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Mandamus Decision Below Should Be Affirmed Under Federal Rules of Evidence 501 and 502 3

A. The ready availability and prior use of Rule 502(d) privilege nonwaiver orders in this case confirms the lack of any material burden, injury, or novelty required for mandamus relief 4

B. The United States cannot establish clear and indisputable entitlement to privilege under Rule 501 because the fiduciary exception and exacting fiduciary duties for federal management of Indian trust funds are well-established 7

C. Existing law categorically precludes the assertion that no enforceable fiduciary duties apply beyond specific statutory or regulatory mandates 12

TABLE OF CONTENTS
(continued)

Page

II. The Government's Asserted Conflicting Duties and Disclosure Concerns are Legally and Factually Unfounded. 16

A. Tribal trust fund management advice is not subject to any of the asserted conflicts or concerns and disclosure here will promote observance of law and not chill government communications. 16

B. Executive Branch guidance actually makes clear that government attorneys do provide fiduciary advice for Indian tribes..... 18

C. Review of disclosed disputed documents refutes asserted conflicts and concerns and supports disclosure 22

CONCLUSION..... 26

APPENDIX

List of distinct fiduciary exception documents with applicable non-privileged sources 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. California, 460 U.S. 605 (1983) 17

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943) 13

Cheney v. U.S. Dist. Ct., 542 U.S. 367 (2004) 3, 4, 7

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1(1831); 13

Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) 10, 23

Chippewa Cree Tribe v. United States, 69 Fed. Cl. 639 (2006) 10

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 13, 15

Cobell v. Norton, 377 F. Supp. 2d 4 (D.D.C. 2005) 4, 11

Cobell v. Norton, 392 F.2d 461 (D.C. Cir. 2004) 14

Cobell v. Salazar, 573 F.3d 808 (2009) 13

Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1981) 15

Fisher v. United States, 425 U.S. 391 (1976) 18

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005) 7, 18

In re Long Island Lighting Co., 129 F.3d 268 (2nd Cir. 1997) 17

Jicarilla Apache Nation v. United States, 91 Fed. Cl. 489 (2010) 5, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Jicarilla Apache Nation v. United States, 93 Fed. Cl. 219 (2010) 6

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (10th Cir.1984) 15

Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.1986) 15

Jicarilla Apache Tribe v. Supron Energy Corp., 793 F.2d 1171 (10th Cir. 1986) 15

Mitchell v. United States, 66 F.2d 265 (Ct. Cl. 1981) 11

Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009) 3, 17, 18

Morton v. Mancari, 417 U.S. 535 (1974) 13

Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966) 11

Navajo Tribe v. United States, 624 F.2d 981 (Ct. Cl. 1980) 15

Nevada v. United States, 463 U.S. 110 (1983) 14, 16

Seminole Nation v. United States, 316 U.S. 286 (1942) 11

Trammel v. United States, 445 U.S. 40 (1980) 18

United States v. Evans, 113 F.3d 1457 (7th Cir. 1997) 7, 18

United States v. Legal Servs. for N.Y.C., 249 F.3d 1077 (D.C. Cir. 2001) 7, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Mett, 178 F.3d 1058 (9th Cir. 1999) 8, 17

United States v. Mitchell, 445 U.S. 535 (1980) 20

United States v. Mitchell, 463 U.S. 206 (1983) ..... passim

United States v. Navajo Nation, 129 S. Ct. 1547 (2009) 9, 11, 12

United States v. Navajo Nation, 537 U.S. 488 (2003) 8, 12

United States v. Winans, 198 U.S. 371 (1905) 13

United States v. Zolin, 491 U.S. 554, (1989) 22

Upjohn Co. v. United States, 449 U.S. 383 (1981) 18

Varity Corp. v. Howe, 516 U.S. 489 (1996) 15

Wachtel v. Health Net, Inc., 482 F.3d 255, 231 (3rd Cir. 2007) 18

Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 13

STATUTES

25 U.S.C. § 2 20

25 U.S.C. § 161 ..... 9, 10, 16

25 U.S.C. § 161a(a) 9, 10, 16

25 U.S.C. § 162a(a) 9, 10, 16

25 U.S.C. §§ 162a(d)(1)-(7) 10, 16

25 U.S.C. § 162a(d) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

25 U.S.C. § 406(a) 9

Pub. L. 93-595, § 1, 88 Stat. 1926, 1933 (1975) (codified at Fed. R. Evid. 501) 7

RULES

Federal Rules of Evidence 501 ..... passim

Federal Rules of Evidence 502 ..... 2, 3, 5

Federal Rules of Evidence 502(d) 4, 5, 6

OTHER AUTHORITIES

303 DOIM ch. 6 17

303 DOIM §§ 2.7, 2.7(K). 10, 11

ADR CAPO, *Jicarilla Apache Nation v. United States*, No. 02-25L (Fed. Cl. April 4, 2005) (ECF No. 100) 5

Brief for United States, *United States v. Mitchell*, 463 U.S. 206 (1983) (No. 81-1748) 14

Brief for United States, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (No. 01-1067) 14

Cohen's Handbook of Federal Indian Law § 5.04[4][a] (Nell Jessup Newton *et al.* eds. 2005 ed.) 13

Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Attorney General, U.S. Dep't of Justice re: *United States v. Maine* (Nov. 21, 1978) 20, 21

Mem. from Assoc. Solicitor, Div. of Indian Affairs to ASIA (Feb. 10, 1986) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Mem. from Assoc. Solicitor, Div. of Indian Affairs, to Deputy ASIA (May 13, 1985) 25

Mem. from Thomas W. Fredericks, Assoc. Solicitor, Indian Affairs, to Deputy Asst. Sec.—Indian Affairs (Program Operations) (Jan. 24, 1978) 23, 24

Mem. from William G. Lavell, Assoc. Solicitor, Div. of Indian Affairs, to ASIA (March 21, 1990) 25

President Richard M. Nixon, Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970) 13, 20

Reply Brief for United States, *United States v. Mitchell*, 463 U.S. 206 (1983) (No. 81-1748) 14

S. Hrg. No. 101-1011, at 11 (1990) 21

AMICUS CURIAE BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT

The Navajo Nation and the Pueblo of Laguna ("*Amici*") respectfully submit this *amicus curiae* brief in support of Respondent, the Jicarilla Apache Nation ("Jicarilla").[1]

INTEREST OF *AMICI CURIAE*

Amici hold beneficial title to funds that by statute expressly are held in trust and invested for their best interests in the full and exclusive control of the United States. *Amici* also are plaintiffs in trust fund mismanagement cases pending before the same Court of Federal Claims judge as this case. *Amici* have an interest in obtaining the documents that are the subject of the mandamus privilege ruling under review here because the same documents are relevant to discovery requests in *Amici*'s cases. In addition, *Amici* have an interest in ensuring that the United States does not disregard or misrepresent rulings in prior cases involving them and other tribes in an unwarranted effort to eviscerate its long-standing and strict fiduciary duties over tribal trust fund management.

---

[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel has made a monetary contribution in preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case readily warrants affirmance under Federal Rules of Evidence 501 and 502. The United States cannot establish clear and indisputable entitlement to mandamus relief because the prior use and ready availability of privilege nonwaiver orders under Rule 502 confirms the lack of any material burden, injury, or novelty from the production order at issue here. In addition, the United States cannot meet its burden of establishing privilege under Rule 501 because there is an undisputed fiduciary relationship between the United States and Indian tribes, under which federal administration of tribal trust funds is subject to the most exacting fiduciary standards, including duties of loyalty and disclosure. The United States' misrepresentation of and disregard for existing case law recognizing that fiduciary relationship should be summarily rejected.

If further consideration of this case is required, the United States cannot evade the fiduciary exception and duties of loyalty and disclosure here based on speculative allegations of preclusive conflicts of interest and potential harms from disclosure in other contexts. The allegations are legally meritless because the decision below expressly reserved ruling on statutory conflicts, which cannot exist for tribal trust fund management, and only disclosure here will further the purpose of the attorney-client privilege by deterring federal officials from violating recognized trust duties. In turn, contemporaneous federal policies and available disputed documents themselves readily refute the government's post-hoc factual allegations.

ARGUMENT

The decision below should be affirmed because Federal Rules of Evidence 501 and 502 preclude the United States from establishing either privilege or entitlement to mandamus relief. Also, the effort to repudiate enforceable federal-tribal fiduciary duties is wholly unwarranted by existing law. Even if further consideration of this case is warranted, the claimed preclusive conflicts of interest and potential harms from disclosure here are legally meritless and factually unfounded.

I. The Mandamus Decision Below Should Be Affirmed Under Federal Rules of Evidence 501 and 502.

The decision below is a mandamus ruling. Pet. App. 1a. "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation" of the "extraordinary remedy of mandamus." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (citations and quotations omitted). For this, the party seeking mandamus must establish there is "'no other adequate means to attain the relief he desires'" and that the "'right to issuance of the writ is clear and indisputable.'" *Id.* at 380–81 (quotations omitted). Accordingly, "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege" absent "a particularly injurious or novel privilege ruling." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606, 607 (2009). For example, interlocutory appellate review is unavailable for discovery orders absent overly broad and burdensome discovery requests that disrupt executive

branch functioning at its highest level concerning constitutional prerogatives. *See Cheney*, 542 U.S. at 381–89. Under these strict standards, application of Federal Rules of Evidence 501 and 502 here readily precludes mandamus relief.

A. The ready availability and prior use of Rule 502(d) privilege nonwaiver orders in this case confirms the lack of any material burden, injury, or novelty required for mandamus relief.

Unlike *Cheney*, the mandamus petition here does not involve overly broad or burdensome discovery or constitutional prerogatives, since it only concerns about 51 materially different documents (not including waiver, duplicates, and apparent multiple versions), all of which are potentially relevant to Jicarilla's trust fund claims under statutorily based duties. *Compare* App. (chart listing apparently distinct disputed documents) *with* Pet. App. 30a-31a (duties), 51a (relevance), 54a (waiver), 62a (noting similar but not identical documents), 71a-84a (production list with apparent multiple versions). Also, there can be no claim of a particularly injurious or novel privilege ruling in this case since four prior decisions over the last nine years "discredit many of the apparently well-rehearsed arguments that defendant raises here." Pet. App. 45a (concerning three prior rulings); *see id.* at 14a (citations), 44a-46a (discussion), 85a-90a (one prior decision); *see also Cobell v. Norton*, 377 F. Supp. 2d 4 (D.D.C. 2005) (denying motion to strike). Moreover, the United States' failure to resist all three prior fiduciary exception production orders in Indian trust cases "give[s] its claims of dire circumstances here a somewhat hollow ring." *Jicarilla*

Apache Nation v. United States ("*Jicarilla IV*"), 91 Fed. Cl. 489, 494 n.8 (2010).

This lack of any material burden, injury, or novelty required for mandamus relief is confirmed by the fact that the United States readily possesses adequate alternative means under Federal Rule of Evidence 502 to protect against privilege waiver or document dissemination. Specifically, Rule 502(d) provides the following: "A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding." Consistent with that Rule, more than three years before alternative dispute resolution ("ADR") efforts in this case ended and Jicarilla moved to compel production of fiduciary exception documents, the parties jointly moved for, and the trial court entered, an ADR Confidentiality Agreement and Protective Order ("CAPO") that expressly provided for the parties to produce documents without privilege review and preserved privilege claims. *See* ADR CAPO, *Jicarilla Apache Nation v. United States*, No. 02-25L (Fed. Cl. April 4, 2005) (ECF No. 100). As noted below, the United States produced "many thousands of documents to Jicarilla" during the five and a half years of ADR proceedings in this case. Pet. App. 25a.

Moreover, after the fiduciary exception mandamus ruling by the Federal Circuit here, the trial court specifically recognized that "[i]f defendant truly is concerned that the production here would occasion a waiver of the privilege in other cases, it can easily remedy that matter by formally seeking relief under this rule [502]. But, to date, it has skirted

this issue." *Jicarilla IV*, 91 Fed. Cl. at 494. And since that ruling, the United States has twice sought and obtained orders under Rule 502(d) in this case. The first order, sought by the United States unopposed, pending final review of the Federal Circuit ruling, provides for production of all fiduciary exception documents in the case per Rule 502(d). Pet. App. 93a-97a. The second, stipulated and published Rule 502(d) order applies for the duration of the case regardless of this appeal and concerns over a million pages of documents not subject to the pending appeal in pending discovery from a certain repository. *Jicarilla Apache Nation v. United States* ("*Jicarilla V*"), 93 Fed. Cl. 219, 219–20 (2010).

The United States therefore already has availed itself three times in this case of orders preserving claimed attorney-client privilege regardless of the fiduciary exception. Also, it can easily address that concern for the duration of this case for the relatively few documents at issue here and any similar documents identified later simply by seeking such relief under Rule 502(d), as invited by the trial court. Consequently, that readily applicable rule provides more than adequate means to provide privilege protection here, and so precludes mandamus relief in this case.

B. The United States cannot establish clear and indisputable entitlement to privilege under Rule 501 because the fiduciary exception and exacting fiduciary duties for federal management of Indian trust funds are well-established.

Even if this Court reaches the fiduciary exception, the United States cannot meet its burden of establishing "clear and indisputable" entitlement to privilege for each document at issue as required to warrant mandamus relief. *See Cheney*, 542 U.S. at 381 (mandamus); *In re Grand Jury Subpoena: Under Seal* ("*Under Seal*"), 415 F.3d 333, 338-39 (4th Cir. 2005) (privilege proof burden); *United States v. Legal Services for N.Y.C.*, 249 F.3d 1077, 1081-82 (D.C. Cir. 2001) (same); *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (same). This analysis must proceed under the congressionally enacted Federal Rule of Evidence 501, which provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Pub. L. 93-595, § 1, 88 Stat. 1926, 1933 (1975) (codified at Fed. R. Evid. 501). Unlike the United States' effort to assert privilege here without reference to Rule 501, a proper analysis under that rule is straightforward and outcome determinative.

The United States does not dispute the general existence of a common-law fiduciary exception to the common-law attorney-client privilege, which dates back to 1855 and is well established in this country, including by at least five federal circuits. *See* Pet.

App. 9a-13a. Under that precedent, the doctrine "has been applied in a panoply of fiduciary settings, including cases involving shareholders, bank depositors, and union members," as well as under the Employee Retirement Income and Security Act (ERISA). Pet. App. 43a-44a. The United States also does not dispute the two general rationales for the fiduciary exception—namely, "the fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary" and "the fiduciary has a duty to disclose all information related to trust management to the beneficiary." Pet. App. 13a (citing authorities).

Accordingly, while the United States characterizes the ruling below as "abrogating" the attorney-client privilege, the common law recognizes that "the fiduciary exception is not an 'exception' to the attorney-client privilege at all." *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). "Rather, it merely reflects the fact that," for trust administration advice, a trustee "never enjoyed the privilege in the first place" against the beneficiary. *Id.*; *cf.* Pet. App. 9a (discussing community of interest doctrine).

Therefore, since the fiduciary exception applies to the disputed documents, they are not subject to the attorney-client privilege. The fiduciary exception unquestionably applies here under Rule 501 because there is an "'undisputed . . . general trust relationship between the United States and the Indian people[,]'" *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983)). Also, statutes impose judicially enforceable fiduciary duties where they give the Government "'full responsibility'" to manage Indian assets "'for the benefit of

the Indians.'" *United States v. Navajo Nation* ("*Navajo II*"), 129 S.Ct. 1547, 1553-54 (2009) (quoting *Mitchell II*, 463 U.S. at 224). For example, duties apply where statutes require the United States to consider the "'best interests of the Indian'" and "enumerate[] specific factors to guide that decision-making." *Id.* at 1554 (quoting 25 U.S.C. § 406(a)).

For tribal trust funds, Congress has expressly provided three primary federal management options:

(i) "*deposit[] in the Treasury* of the United States" and "pay interest" as "prescribed by law" for "all sums . . . received . . . as . . . trustee of various Indian tribes" when "the best interests of the Indians will be promoted by such deposits, in lieu of investments;" 25 U.S.C. § 161 (emphases added);

(ii) "*deposit in banks* . . . funds of any Indian tribe which are held in trust . . . and on which the United States is not required by law to pay interest at higher rates than can be procured from the banks[,]" *id.* § 162a(a) (emphases added); or

(iii) (a) "[a]ll funds held in trust by the United States" for "tribes shall be *invested* . . . in public debt securities with maturities suitable to the needs of the fund involved . . . taking into consideration current market yields . . . [,]" *id.* § 161a(a) (emphases added); or
(b) "for the best interest of the Indians, . . . *invest* the trust funds of any tribe . . . in public debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States[,]" *id.* § 162a(a) (emphases added).

See generally Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390, 1393-94 (Ct. Cl. 1975) (discussing Indian trust fund management statute evolution since before 1880); *Chippewa Cree Tribe v. United States*, 69 Fed. Cl. 639, 656-59 (2006) (same).

In addition, Section 162a expressly and nonexclusively provides that "proper discharge of the trust responsibilities of the United States shall include (but is not limited to)" seven detailed facets of trust fund management. 25 U.S.C. §§ 162a(d)(1)-(7). Among other things, those responsibilities include establishing written policies and procedures, providing adequate controls, staffing, supervision, training, timely reconciliations, and accounting and reporting systems, and supplying account holders with account performance statements. *Id.* The United States has formally interpreted this statute as requiring a "high degree of skill, care, and loyalty" as well as "communicat[ing] with beneficial owners regarding the management and administration of Indian trust assets[.]" 303 U.S. Dep't of Interior Manual ("DOIM") §§ 2.7, 2.7(K).

The United States here overlooks 25 U.S.C. Section 161 and belittles 25 U.S.C. Sections 161a(a), 162a(a), 162a(d). *See* U.S. Br. 10, 33, 38. However, these statutes all "expressly and without qualification employ[] a term of art ('trust') commonly understood to entail certain fiduciary obligations" and "invest the United States with discretionary authority to make use of the trust corpus[,]" *White Mountain*, 537 U.S. at 480 (Ginsburg, J., conc.) (citation and alteration omitted). Moreover, the statutes give the Government full responsibility to manage trust funds for the benefit of tribes and each imposes con-

crete substantive obligations on the Government. Also two of the statues expressly require that the United States consider the "best interests of the Indians" like the timber statute quoted in *Navajo II* and addressed in *Mitchell II*, while the other statute provides for bank deposits only where the United States is not required to pay higher interest rates.

In addition, *Mitchell II* recognized that Section 162a(a) of these Indian trust fund statutes, which vests the United States with authority to invest Indian trust funds "for the best interests of Indians[,]" imposes enforceable fiduciary duties because the government has assumed "elaborate control" over such tribal trust funds or monies, and all the necessary elements of a common-law trust are present. 463 U.S. at 222 & n.24, 225, *affirming Mitchell v. United States*, 66 F.2d 265, 274 (Ct. Cl. 1981) (en banc). This Court also has recognized that "the Government's fiduciary obligation" for tribal trust fund distribution is subject to "the most exacting fiduciary standards[,]" including "'undivided loyalty[,]'" *Seminole Nation v. United States*, 316 U.S. 286, 297 & n.12 (1942) (citation omitted). Given these decisions and the several additional governing statutes here, the most exacting fiduciary duties govern Indian trust fund management, including loyalty and disclosure. *See* 303 DOIM §§ 2.7, 2.7(K); *Navajo Tribe v. United States*, 364 F.2d 320, 324 (Ct. Cl. 1966) (en banc) (concerning loyalty); *Cobell*, 377 F. Supp. 2d at 12-13 (concerning disclosure). Under Rule 501, that is all that is necessary to apply the fiduciary exception, thereby warranting affirmance of the mandamus ruling below.

C. Existing law categorically precludes the assertion that no enforceable fiduciary duties apply beyond specific statutory or regulatory mandates.

Because the mandamus petition requires the United States to show clear and indisputable entitlement to privilege under the Federal Rules of Evidence, there is no occasion here to address the full scope of enforceable fiduciary duties for trust fund mismanagement claims. *Cf.* Pet. App. 66a (adjudicating relevancy dispute "without prejudging the precise standards that will ultimately govern liability in this case"). But even if resolution of this privilege mandamus petition required some material definition of the scope of enforceable fiduciary duties, the United States' assertion that *Navajo I* and *Navajo. II* preclude any enforceable fiduciary duties beyond "a specific statutory or regulatory mandate[,]" U.S. Br. 31; *see id.* at 31-35, is meritless.

The *Navajo* decisions did not define a new standard on the scope of enforceable fiduciary duties, as they both followed the *Mitchell* decisions, *Navajo II* largely just followed *Navajo I*, and *Navajo I* expressly referred to the *Mitchell* decisions as "the path-marking precedents on the question[.]" *Navajo II*, 129 S.Ct. at 1552, 1554; *Navajo I*, 537 U.S. at 503-08. Moreover, *Mitchell II* and *White Mountain* both apply common-law fiduciary duties once "a further source of law . . . provide[s] focus for the trust relationship." *White Mountain*, 537 U.S. at 475, 477; *Mitchell II*, 463 U.S. at 224-26. Thus, statutes and regulations (and treaties or other foundational documents) "establish a fiduciary relationship and define the contours of the United States' fiduciary re-

sponsibilities[,]" *Mitchell II*, 463 U.S. at 224, "but the interstices must be filled in through reference to general trust law." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001); *see also id.* at 1099, 1104; *Cobell v. Salazar*, 573 F.3d 808, 812 (2009) (reiterating that common-law trusts apply).

The United States thus improperly disregards that "[t]oday the trust doctrine is one of the cornerstones of Indian law." Cohen's Handbook of Federal Indian Law § 5.04[4][a], at 419 (Nell Jessup Newton *et al.* eds. 2005 ed.) Indeed, the federal-tribal trust relationship necessarily arose from treaties and agreements under which Indians "surrendered claims to vast tracts of land" and the United States undertook "solemn obligations" that "continue[] to carry immense moral and legal force." President Richard M. Nixon, Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 565 (July 8, 1970) ("Nixon Message") (emphasis added); *see also Morton v. Mancari*, 417 U.S. 535, 552 (1974); *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); Pet. App. 29a.

Moreover, the United States' current unfounded assertion has been previously rejected numerous times. First, this Court heard, considered, and rejected that assertion in *White Mountain*, where this Court used common law to help define applicable enforceable fiduciary duties despite arguments that no statute or regulation imposed a duty to restore and maintain the building at issue, that common-law

trust duties are irrelevant, and that only specific fiduciary duties that are explicitly stated in a statute or regulation are enforceable. *Compare White Mountain*, 537 U.S. at 370, 476-77 *with* Brief for United States, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (No. 01-1067), at 11, 19 & n.8, 22, 26, 31, 37 & n.14, 38 n.15. Second, in *Mitchell II*, this Court similarly used common law to affirm the scope of enforceable fiduciary duties despite similar arguments there. *Compare Mitchell II*, 463 U.S. at 210 (listing claims), 225-26 (analysis) *with* Brief for United States, *United States v. Mitchell*, 463 U.S. 206 (1983) (No. 81-1748), at 19, 46-48; Reply Brief for United States, *United States v. Mitchell*, 463 U.S. 206 (1983) (No. 81-1748), at 2, 4, 8-9. Indeed, shortly before the Court decided *Mitchell II*, it acknowledged that "[i]t may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Nevada v. United States*, 463 U.S. 110, 142 (1983).

In addition, the United States' assertion here has been explicitly rejected at least four times by lower courts, including in one case whose analysis on this very point was substantially relied on in *Mitchell II*.[2]

---

[2] *See Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *White Mountain*, "once a statutory obligation is identified, the court may look to common law trust principals to particularize that obligation"), *Cobell*, 240 F.3d at 1100-01 (per *Mitchell II*, "the interstices [of government duties] must be filled in through reference to general trust law"); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) (rejecting that "a federal trust must spell out specifically all the trust duties of

In contrast, the United States' reliance on lower court administrative law cases for this point, *e.g.*, U.S. Br. 33, improperly ignores that where the United States acts as a fiduciary, its "'actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.'" *Cobell*, 240 F.3d at 1104 (quoting *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir. 1986), *supplemented*, 793 F.2d 1171 (10th Cir. 1986)).

In sum, "[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996). The current privilege mandamus petition thus provides no basis to repudiate an enduring cornerstone of Indian law expressly reaffirmed by Congress in 25 U.S.C. Section 162a(d). Consequently, this case should be affirmed under Federal Rule of Evidence 501.

---

the Government"); *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) ("Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . . ."); *cf Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987)

II. The Government's Asserted Conflicting Duties and Disclosure Concerns are Legally and Factually Unfounded.

A. Tribal trust fund management advice is not subject to any of the asserted conflicts or concerns and disclosure here will promote observance of law and not chill government communications.

The mandamus petition under review here concerns federal management of funds owned, held, and managed by the United States exclusively in trust for Jicarilla. Pet. App. 2a, 26a; *see* 25 U.S.C. §§ 161, 161a(a), 162a(a), 162a(d). Given this fact, the assertions that the United States must contend with a "host" of other asserted conflicting mandates here—such as regarding "public lands, threatened and endangered . . . species, and other natural resources"—has no basis in fact, law, or logic. *See* U.S. Br. 23-27, 41. Accordingly, the lower court correctly and necessarily concluded both that the United States "has failed to allege any actual conflict" and that "'potential privilege claims for unspecified documents regarding other types of trust assets based on other statutory regimes are beyond the scope of the petition.'" Pet. App. 19a (citation omitted), 20a.

In addition, this Court has recognized that "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Nevada*, 463 U.S. at 128; *see also id.* at 135 n.15. Moreover, any such "claimed conflict of interest" must be "actual" to affect the per-

formance of federal trust duties. *Arizona v. California*, 460 U.S. 605, 627 (1983). Indeed, even if some other statutory duties were considered in the documents at issue here, "privileged communication on non-fiduciary matters does not defeat the fiduciary exception . . . on fiduciary matters." *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2nd Cir. 1997). Consequently, none of the concerns about resource management and professional ethics have any relevance to disclosure of trust fund management advice.

The Government's other objections to discovery are similarly unfounded. For example, reliance on the Indian Claims Limitations Act, 28 U.S.C. 2415 note, improperly ignores that documents subject to the fiduciary exception are per se nonprivileged. *See Mett*, 178 F.3d at 1063. Also, the assertion of government ownership of records overlooks that other trustees may own records subject to the fiduciary exception, *see* Pet. App. 10a-12a (noting contexts where exception has been applied), and that the relevant records here are expressly (if not redundantly) defined and addressed as "Indian Fiduciary Trust Records" in an entire chapter of the Department of the Interior Manual. 303 DOIM ch. 6.

In turn, allowing discovery here will not improperly chill government legal advice. The lower court correctly noted that "the basic concern could be stated by any trustee." Pet. App. 20a. There also is a "lack of a discernable chill" because, "in deciding how freely to speak, clients and counsel . . . . must account for the possibility that they will later be required by law to disclose their communications . . . ." *Mohawk*, 130 S.Ct. at 607.

Finally, the attorney-client privilege ultimately "serves 'broader public interests in the observance of law and administration of justice.'" *Id.* at 606 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Thus, the privilege "applies only where necessary to achieve its purpose[,]" *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "[w]here this purpose ends, so too does the protection of the privilege." *Wachtel v. Health Net, Inc.*, 482 F.3d 255, 231 (3rd Cir. 2007). Likewise, because the attorney-client privilege interferes with "'the truth seeking mission of the legal process,'" it must be narrowly construed. *Under Seal*, 415 F.3d at 338 (citation omitted); *Evans*, 113 F.3d at 1487; *see Wachtel*, 482 F.3d at 231. Accordingly, the privilege should be recognized "'only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Under Seal*, 415 F.3d at 338 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Given all this, the attorney-client privilege should not apply to the trust fund administration advice here, where allowing discovery will certainly help ascertain the truth and "deter federal officials from violating their trust duties[.]" *Mitchell II*, 463 U.S. at 227 (quotation and citation omitted).

B. Executive Branch guidance actually makes clear that government attorneys do provide fiduciary advice for Indian tribes.

The Government's assertion that it only views itself as a sovereign and not a fiduciary regarding Indian trust management legal advice is unsupported

by the letter on which it relies and ignores the actual history surrounding that letter. The assertion relies on a statement in a 1979 letter from then Attorney General Bell to the Secretary of the Interior that "the Attorney General is attorney for the United States in these cases, not a particular tribe." Pet. App. 123a. But that statement and much of the related argument by the United States here only concerns "[t]he litigating position adopted by the Attorney General[.]" *Id.* at 124a. Such litigating positions are irrelevant here where the trial court ruled that there is no fiduciary exception to the work-product doctrine, *id.* at 47a, and that ruling has not been challenged by Jicarilla in appellate courts.

Moreover, other parts of the 1979 Bell Letter contravene the current assertion that the Executive Branch only acts as a sovereign and not a fiduciary for Indian tribes. For example, the letter recognizes that "[t]he Executive Branch and the Judicial Branch have inferred in many laws extending federal protection to Indian property rights the intent that the Executive act as a fiduciary in administering and enforcing these measures." *Id.* at 122a. Also, when the Executive Branch brings a case to protect Indian property rights, it "vindicates not only the property interest of the tribe or individual Indian, . . . but also the important governmental interest in ensuring that rights guaranteed to Indians under federal laws and treaties are fully effective." *Id.* at 123a (emphases added).

In addition, contrary to the United States' current assertions, "[t]here is no disabling conflict between the performance of these duties and the obligations of the Federal Government to all the people

of the Nation," precisely because "the people as a whole benefit when the Executive Branch . . . protects Indian property rights . . . ." *Id.* Indeed, the people as a whole already have long benefited from "surrendered claims to vast tracts of land[.]" Nixon Message, *supra*, at 565. Finally, even when other statutory obligations are imposed in a case aside from those affecting Indians, the Executive Branch must take into account the "firmly established" rule of construction favoring the "special responsibilities of the government toward the Indians." Pet. App. 124a. The Bell Letter accordingly confirms that sovereign interests augment, rather than undermine, proprietary trust duties to Indians.

Furthermore, both before and after the 1979 Bell Letter, the Executive Branch has recognized the strong basis for and broad extent of federal fiduciary duties to Indians, which support application of the fiduciary exception here. For example, six months before the Bell Letter, the Department of the Interior—the primary agency charged with Indian affairs policy responsibility, *see* Pet. App. 122a, 124a; 25 U.S.C. § 2—"disagree[d] with the position taken by the Solicitor General in this litigation . . . ." *United States v. Mitchell*, 445 U.S. 535, 550 (1980) (White, J., diss.) ("*Mitchell I*") (citing Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Attorney General, U.S. Dep't of Justice re: *United States v. Maine* (Nov. 21, 1978) ("Krulitz Letter") in appendix filed with the Court). That letter recognized the following:

(i) it "is established beyond question" that "the United States stands in a fiduciary relationship to American Indian tribes[;]"

(ii) "[t]here is a legally enforceable trust obligation owed by the United States to American Indian tribes;

(iii) "[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive"[,]" including "fiduciary duties of care and loyalty," "unless . . . Congress has expressly authorized a deviation from those standards[;]"

(iv) the "trust relationship was a significant part of the consideration offered by the United States" when "tribes ceded vast acreages of land and concluded conflicts[;]"

(v) "the trust obligation of the United States exists apart from specific statutes, treaties or agreements[;]"

(vi) "[g]eneral notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of executive branch officials in their discharge of responsibilities toward Indians and are properly utilized to fill any gaps in the statutory framework[;]" and

(vii) Executive Branch officials "are not free to abandon Indian interests or to subordinate those interests to competing policy considerations."

Krulitz Letter, *supra*, at 2a, 3a-4a, 9a, 12a, 14a, 18a.

After the 1979 Bell Letter, the Executive Branch has remained committed "to ensure that every policy decision of the Interior and other Federal agencies and bureaus with an impact on the trust obligation of this Government has fully measured that decision in respect to carrying out its trust obligation." S. Hrg. No. 101-1011, at 11 (1990). Moreover, the Ex-

ecutive Branch has opposed legislation as "not . . . necessary to accomplish this goal[,]" and instead has worked on "accomplishing and institutionalizing this goal" within the Department of the Interior. *Id.* at 12, 65. In light of all this, the Bell Letter supports a broad, substantive understanding of federal trust duties to Indian tribes, consistent with prior and subsequent views of the Executive Branch. All this guidance supports application of the fiduciary exception for federal management of tribal trust funds.

C. Review of disclosed disputed documents refutes asserted conflicts and concerns and supports disclosure.

Privilege must be proven for each communication for which it is asserted, *Legal Services for N.Y.C.*, 249 F.3d at 1082, and *en camera* inspection is important in resolving privilege disputes, Pet. App. 26a n.2; *United States v. Zolin*, 491 U.S. 554, 568-69 (1989). In addition, the United States makes factual assertions about the disputed documents here. *E.g.*, U.S. Br. 10. Accordingly, a review of those documents is helpful for resolution of issues here if they cannot be resolved on purely legal grounds.

At least 22 of what appear to be 51 materially different documents that were ordered to be produced by the trial court here based solely on the fiduciary exception are already in tribes' possession. *Compare* App. (listing distinct fiduciary exception documents from trial court order with nonprivilege sources where applicable) *with* Pet. App. 54a n.19 (noting waiver for additional documents), 71a-84a (listing all documents). Eleven of these documents also were publicly filed as trial or summary judgment exhibits

by plaintiffs or the United States in *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). *See* App. 1a-2a. All those documents have been publicly available from the court or National Archives for at least about three decades. Four additional documents are duplicates of documents that were independently found in tribal repositories or obtained from a third party. *See* App. 2a-3a.

Review of these previously produced but still disputed documents sheds light on pending issues. For example, one document opposes private management of tribal trust funds. Several documents discuss the use of public-debt securities. Other documents discuss the use of a broker, classification of receipts, trust fund duties, collateral pledges, pooling, interest ownership, IRS levies, fund disposition, use of independent judgment, self-determination contracting, and application of *Mitchell II*. Nothing in any of these documents evidences any conflict of interest, anything for which disclosure would disrupt trust fund administration, or any other concerns asserted by the United States here. Also, these documents uniformly contradict the United States' current litigating position that it is only subject to duties expressly stated in statutes and regulations.

For example, one of the fiduciary exception documents includes a 1978 attorney memo on pooling tribal trust funds that was publicly filed as one of the United States' trial exhibits in *Cheyenne-Arapaho*. *See* Mem. from Thomas W. Fredericks, Assoc. Solicitor, Indian Affairs, to Deputy Asst. Sec. —Indian Affairs ("ASIA") (Program Operations) (Jan. 24, 1978) ("Fredericks Memo"); *cf.* Pet. App. 54a n.19 (noting waiver for Docs. 13-14), 73a (listing

Docs. 13-15).[3] The memo reflects the United States' contemporaneous view that "[i]n general, the standards which govern private trustees govern the Secretary when he invests Indian trust funds[,]" particularly when "[n]o guidance is found in the statute with respect to present question." Fredericks Memo, *supra*, at 1. The memo quotes common-law trust treatises at length and concludes that pooling tribal trust funds is defensible "even in the absence of express statutory authority[.]" *Id.* at 2-5. This same point is reaffirmed in a 1986 attorney memo for which the fiduciary exception also is in dispute but which also has been previously disclosed. Mem. from Assoc. Solicitor, Div. of Indian Affairs to ASIA re: Pooling of Tribal Funds for Investment Purposes (Feb. 10, 1986; *cf.* Pet. App. 54a n.19 (noting waiver for Doc. 13), 73a (listing Docs. 13, 15-16).

In addition, a 1983 attorney memo discussed consequences of *Mitchell II*. Mem. from Tim Vollmann, Acting Assoc. Solicitor, Div. of Indian Affairs, to ASIA re: *United States v. Mitchell* (July 21, 1983) ("*Mitchell II* Memo"); *cf.* Pet. App. 83a (listing Docs. 189, 190, and 212); Pet. App. 62a (noting that these documents are "similar, but not identical"). The memo emphasizes that the United States must "make maximum productive investment of trust funds" and "exercise independent judgment" rather than "base a decision solely on the wishes of a tribe" even though there are no such express statutory duties. *Mitchell II* Memo, *supra*, at 3. Similar analysis

---

[3] Per Supreme Court Rule 32.3, *Amici* have proposed lodging Krulitz Letter and three unprotected disputed documents that have not yet been filed of record before the Court in this case. *Amici* will submit material if so requested by the Clerk.

is provided in a 1985 attorney memo for which the fiduciary exception also remains in dispute but which also has been previously disclosed. Mem. from Assoc. Solicitor, Div. of Indian Affairs, to Deputy ASIA (May 13, 1985); *cf.* Pet. App. 78a (listing Doc. 168), 79a (listing Doc. 191).

Finally, a 1990 attorney memo that was apparently provided to tribes in the early 1990s but whose status is still disputed here discusses the contractibility of tribal trust fund investment under the Indian Self-Determination Act. *See* Mem. from William G. Lavell, Assoc. Solicitor, Div. of Indian Affairs, to ASIA (March 21, 1990) ("Lavell Memo"); *cf.* Pet. App. 74a (listing Doc. 44), 77a (listing Doc. 96). Among other things, the memo relies on "common law trust principle[s]" and recognizes non-delegable trust duties for tribal trust fund deposits and investment under 25 U.S.C. Section 162a that are "consistent with the common law trust duty owed by a private trustee[.]" Lavell Memo, *supra*, at 1-4.

In all these disputed documents, federal attorneys recognize the United States' common-law fiduciary relationship with Indian tribes and provide legal advice to facilitate trust administration, and there is no potential conflict or other concern that might warrant disregarding the fiduciary exception. In addition, disclosure of all these documents to the tribal trust fund beneficiary would further the purposes of the attorney-client privilege for observance of law and administration of justice. Specifically, applying the fiduciary exception to all the disputed documents will encourage sound legal advice for tribal trust fund management consistent with recog-

nized fiduciary duties and will advance the truth-seeking mission of the legal process.

This last point is highlighted by a motion for partial summary judgment that the United States has filed in this case after filing its opening brief here. *See* United States' Mot. For Partial Summ. J (as to "Pooling"-Related Claims), *Jicarilla Apache Nation v. United States*, No. 02-025 (filed March 18, 2011) (ECF No. 269). The United States argues there that claims based on pooling should be dismissed, even though all five of the specific disputed documents discussed above directly contradict assertions in the pending motion. The attorney-client privilege should not shield discovery of the United States' repeated acknowledgements of its enforceable fiduciary duties for Indian trust fund management. Rule 501 should not be understood or applied to subvert observance of law and administration of justice by precluding discovery of such communications that are directly relevant to the parties' claims and defenses.

CONCLUSION

For the reasons above, this Court should affirm.

Respectfully submitted,

ALAN R. TARADASH
Counsel of Record
DANIEL I.S.J. REY-BEAR
TIMOTHY H. MCLAUGHLIN
NORDHAUS LAW FIRM, LLP
405 Dr. Martin Luther
King, Jr. Ave. NE
Albuquerque, NM 87102
artaradash@gmail.com
505-243-4275

March 31, 2011

APPENDIX

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
1	41	10/16/1923	
2	70	4/8/1966	*Cheyenne-Arapaho*, Def.'s Ex. 3
3	217	9/30/1966	
4	63	10/7/1966	
5	64	10/22/1966	
6	66	1/10/1967	
7	65, 100	5/3/1968	*Cheyenne-Arapaho*, Pl.'s Ex. 1
8	69	12/30/1969	
9	68	12/14/1970	*Cheyenne-Arapaho*, Def.'s Ex. OE-1
10	67, 71	10/19/1971	
11	74	2/7/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
12	38, 73	3/6/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101; Pl.'s Ex. 125
13	39	7/17/1972	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
14	48, 50	10/3/1972	*Cheyenne-Arapaho*, Pl.'s Ex. 511
15	72	10/27/1972	*Cheyenne-Arapaho*, Pl.'s Ex. 131
16	103	10/30/1972	

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
17	104	11/1/1972	
18	42, 53	11/20/1972	*Cheyenne-Arapaho*, Def.'s Ex. 36
19	49, 51	4/19/1973	
20	94, 155	6/27/1973	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
21	54	10/10/1973	
22	52	4/29/1975	
23	97	5/15/1975	*Cheyenne-Arapaho*, Def.'s Ex. AP-101
24	86	4/26/1976	Tribal Repository
25	186	6/17/1976	
26	184	10/00/1976	Produced under CAPO
27	105	00/00/1977	
28	188	5/1/1979	
29	106	4/14/1980	
30	187	6/9/1980	
31	179	1/7/1981	
32	45	3/5/1982	Produced under CAPO
33	182	8/16/1982	
34	37	11/23/1982	
35	189, 190, 212	7/21/1983	Third Party
36	178	1/16/1984	

NO.	DOC.	DATE	NONPRIVILEGED SOURCE
37	9	5/13/1985	Produced under CAPO
38	168, 191	5/13/1985	Produced under CAPO
39	112, 167	10/29/1986	Produced under CAPO
40	62	4/21/1988	
41	80	12/15/1988	Produced under CAPO
42	87	5/24/1989	Tribal Repository
43	61	10/13/1989	
44	77	2/13/1990	Produced under CAPO
45	44, 96	3/21/1990	Tribal Repository
46	60	11/21/1990	
47	110	6/1/1992	
48	116	12/28/1995	
49	35, 81, 177	4/10/1996	
50	56	Undated	
51	202	Undated	